No. 264.
(16,827.)
Brief of Fearons & Holladay for Respondent
IN THE

Office Supreme Court U. S.
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Supreme Court of the United States.

October Term, 1898.
Filed Mar. 18, 1899.
No. 264.

THE CITY OF RICHMOND, Petitioner,

vs.

THE SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Brief for Respondent.

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Southern Bell Telephone & Telegraph Co.

EXPLANATORY PREFACE.

This brief is so arranged under headings, and so analyzed by the index, that the reader may readily turn to the discussion of that topic which for him is the point of interest or of difficulty in the cause, avoiding what he may regard as not requiring elucidation or argument.

Authorities cited are so listed, indexed and spaced, that any case may be read or passed at pleasure.

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IN THE

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THE CITY OF RICHMOND, PETITIONER,

vs.

THE SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Brief for Appellee or Respondent.

JURISDICTION.

In behalf of the Southern Bell Telephone and Telegraph Company we respectfully submit that the appeal from the Circuit Court to the United States Circuit Court of Appeals for the Fourth Circuit was improperly taken; that the city of Richmond could not appeal from the decrees entered by the Circuit Court to the Circuit Court of Appeals, whether the decree of August 23d, 1897, be regarded as interlocutory or final; that if any right of appeal exists from the decree entered by the Circuit Court, such appeal should have been taken directly to

the Supreme Court of the United States and not to the said Circuit Court of Appeals.

The appellee in the Circuit Court of Appeals moved that court to dismiss the appeal and the case, and the motion was overruled by the decree of February 5, 1898, record marginal page 113, which declares that * * "it is now here ordered, adjudged and decreed by this court that the motion made by the appellee at the last term of this court (before the case was heard) to dismiss this appeal and case, because said appeal should have been taken to the Supreme Court of the United States, and not to this court, be, and the same is hereby overruled. * *"

Appeals must be taken from final decrees of the Circuit Courts to the Supreme Court in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States is drawn in question, and in any case in which the law of a State is claimed to be in contravention of the Constitution of the United States. See 26 U. S. Stats., 827, sec. 5.

All of these questions were presented by the appeal at bar. The appellant in its demurrer, marginal pp. 33–34 of the record, raised questions involving the construction and application of the Constitution of the United States as applied to the act of Congress approved July 24th, 1866, and insisted that, if the true construction of this act is opposed to appellant's contention—then, and in that event, the act of July 24th, 1866, is unconstitutional and void. And the appellee in its bill, marginal pp. 10, 11 and 12, insists that, if certain ordinances (which the city of Richmond says should have been construed by the Circuit Court and should be construed by this court) are held to be opposed to its contention—then, and in that event, these ordinances of the city of Richmond would deprive the appellee of vested rights guaranteed to it under the Constitution of the United States, and that said ordinances (if construed and given the meaning and intent placed upon them by the city of Rich-

mond) are in contravention of the Constitution of the United States, and therefore null and void.

The Appellant seems to us to be on the horns of a dilemma with reference to this question of jurisdiction.

The act of July 24, 1866, under which we claim here, is broad enough in its terms to embrace all Telegraph Companies and clearly includes those doing a local as well as those doing an interstate business. If the act is unconstitutional as to local telegraph lines—as seems to be contended by counsel for the City of Richmond, on pp. 47 and 48 of their brief—then they are taking a position which "draws in question the constitutionality" of this Act of Congress, so far as it refers to Telegraph Companies not doing an interstate business. On the other hand, if they admit that its scope is as broad as its language, they can draw no distinction between its application to local Telegraph Companies, and interstate Telegraph Companies. It is too plain for discussion that—if there is any such distinction—it must rest, not on the interpretation of the meaning of the act, but on the power of Congress, under the constitution, to protect one class of Telegraph Companies and not the other. We say Congress can protect and has protected both.

We submit that under a true construction and application of Section 8 of Article 1 of the Constitution of the United States, the Congress had plenary power to establish post-roads and determine the manner of their use for intercommunication and the transmission of intelligence, without reference to State lines, as well as power to regulate commerce with foreign nations and among the several States; that under both of these provisions Congress had power to pass the act of July 24, 1866, and that under a true construction of said act it must be held that the language employed confers upon the Southern Bell Telephone and Telegraph Company the right to "construct, maintain and operate" its lines over and along the post-roads of the United States in the city of Richmond.

We also submit that the Circuit Court was right in basing its decree of August 23, 1897, upon the paramount authority

of the Act of Congress of July 24, 1866, without, at that time, going into a consideration of the State law and city ordinances; but appellant assigned this action of the Circuit Court as error, and asked the Circuit Court of Appeals to construe the Virginia Statute and ordinances of the city of Richmond in a manner which, appellee insists, would render the same repugnant to the Constitution of the United States, and therefore null and void.

In these circumstances we submit that the appeal in this case involved:

1. The construction and application of the Constitution of the United States.

2. A determination of the question whether the act of July 24, 1866, *as applied to the case at bar*, is unconstitutional.

3. A determination of the question whether the ordinances of the city of Richmond, set out in appellee's bill, are in contravention of the Federal Constitution.

STATEMENT OF CASE ON ITS MERITS.

The appellee is a resident of the State of New York; was duly chartered under an act of the Legislature of the State of New York entitled "An Act to Provide for the Incorporation and Regulation of Telegraph Companies." Page 55 of record. Its charter provides for and contemplates the erection and maintenance of its lines not only "within" the State of Virginia, but for the connection of places outside the said State with the lines to be constructed therein.

The appellant, a municipal corporation incorporated and existing in the State of Virginia, under the laws of Virginia, a citizen of said State and having its residence and chief place of business in the Eastern District of Virginia, on the 26th of June, 1884, passed an ordinance, found on page 31 of the record, and which is as follows: (This page and all other pages of the record given in this brief are the marginal pages.)

ORDINANCE

Granting the Right of Way Throughout the City to the Southern Bell Telephone and Telegraph Company.

1. Permission is hereby granted The Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the City of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance.

2. On any route conceded by the Committee on Streets, and accepted by the company, the said company shall, under the direction of the City Engineer, so place its poles and wires as to allow for the use of the said poles by the Fire Alarm and Police Telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the Council or the proper committee to extend the Fire Alarm and Police Telegraph over such route.

3. The Telephone Company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station.

4. No shade-trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the City Engineer and consent of the owners of property in front of which such trees may stand, first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the City Engineer's supervision and control.

5. The ordinance may at any time be repealed by the Council of the City of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law. (See Exhibit K, page 31 of the record.)

The first section gave permission to the appellee "to erect

poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time and upon the conditions and under the provisions of this ordinance."

The second section of the ordinance provides that the company shall so place its poles under the direction of the City Engineer on the routes given it by the Committee on Streets, as to allow the Fire Department and Police Telegraph to use them, &c.

The third section provides that the company should furnish the city with 'phones at a reduced rate

The fourth section provides for the protection of shade trees in putting up poles and wires.

And the fifth section provides that "the ordinance may at any time be repealed by the Council of the city of Richmond, such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

The company put up its poles and wires along and over the streets of the city of Richmond which were specified by the Street Committee, in accordance with the provisions of this ordinance.

The company, on the 13th of February, 1889, accepted the provisions of the Act of Congress of the United States, approved 24th July, 1866. (See page 14 of the Record.) This act, which will be found in the Revised Statutes of the United States, from sections 5263 and 5269 inclusive, is entitled: "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the same for Postal, Military and other Purposes." So much thereof as bears on this case is hereafter copied at page 27 of this brief.

From the time of this acceptance the company had and exercised the right "to construct, maintain and operate" its lines * * "over and along" the streets of the city of

Richmond, as well under the provisions of this act as under the ordinances of the city of Richmond, and of the laws of the State of Virginia, and was entitled to all the benefits conferred and subject to all the obligations imposed by the terms of the act. The streets of the city of Richmond are admitted to be post roads (see statement in the bill, page 4 of the Record, not questioned by the answer, and sections 2 and 7 of "agreed facts," page 89 and 90 of the Record). The Act of March 1st, 1884, section 3964, Rev. Stats. U. S. also provides that "all letter carrier routes established in any city or town for the collection or delivery of mail matters are post roads," thus making the streets and alleys of the city of Richmond, which by Article 2nd in agreed facts are admitted to be letter carrier routes established for the collection and delivery of mail matters, page 89 of the Record, post roads.

The plaintiff in the court below alleges in the bill—

1st. That it sends and receives messages between points in and outside of the State of Virginia by connections made with the Western Union Telegraph Office in the city of Richmond; and,

2nd. That this is done, and has been done for years, under agreement still in force.

1st The statement of Mr. Tree, on page 85, shows the close connection between the wires of the appellee and the Western Union Telegraph Company, by which messages are, and have been for many years, interchanged between persons having 'phones in Richmond—so that a message is started by a patron of the appellee in Richmond or some point connected with Richmond by his 'phone, and without anything more on his part transferred by the clerk in the Western Union Office in Richmond from the 'phone wires entering there to the telegraph wires, and thus sent to a point outside the State, and so messages arriving over the Western Union Telegraph line from points outside of the State, are transferred in the said telegraph office in Richmond, by the telegraph clerk there, to the 'phones

of the appellee in said office, and sent at once to their destinations in Richmond and the surrounding country, by the telegraph company's clerk, without the sender or the receiver having anything to do except to send and receive the message. This is, and has been for many years, the way the business is conducted.

Agreement.

2d. By agreement found on page 68 of record (between the American Bell Telephone Company, lessor and licensor, party of the first part, and the appellee, lessee and licensee, party of the second part) it was and is agreed, that the appellee is allowed to do business under the patents and with the instruments of said lessor and licensor. By section 9 of this agreement the appellee was to cause "each of its exchanges to turn over and deliver to the licensor *and such persons as it may from time to time appoint*, all messages for electrical transmission to points outside the territory of such exchange collected by or coming on the wires or within the control of the exchange. * * * It shall keep and furnish an account of such messages transmitted or received," so that the charges provided for by the agreement might be ascertained and properly divided between the appellee and the Western Union Tel. Co, (p. 71 of record). And the Western Union Telegraph Co. was "appointed" as the party which was to transmit these messages. P. 72. Here, then, is the agreement between the appellee and the American Bell Telephone Company, under which it (the appellee) does business, which requires all these messages to be sent and received over the lines of the Western Union Telegraph Company. This is clearly an agreement under which the appellee was and is bound to give and receive their messages to and from the Western Union Telegraph Company. Nor is this all; for by reference to Bell Ex., No. 9, on pp. 79 and 80, and to item 9 of the statement as to evidence on p. 52, it is shown that the Western Union Telegraph Company has received and now holds from the American Bell Telephone Company 'phones in its office in Richmond, under

an agreement which specifies that they are "to be used only for the purpose of receiving and delivering telegraph messages." See p. 79 and 80 of record. So that the Telegraph Company is also bound by this agreement. The appellee agrees with the American Bell Telephone Company to turn over to and receive from the Western Union their messages, and the Western Union agrees to receive, and does receive, from the American Bell 'phones, which it agrees to use only for the purpose of transmitting such messages. And Ex. Bell, No. 10, on p. 80 and 81 of record, shows that the receipts arising from this business for years before the commencement of this litigation up to the time evidence was taken in this case, have been properly ascertained and accounted for in accordance with this agreement. This contract has not expired, and is still in force, and is still being operated under. The papers together, in fact, make a tripartite agreement by which the American Bell Company furnishes 'phones to the Southern Bell and the Western Union Telegraph Company, upon an agreement between all three of them that messages shall be sent and received over the wires of the latter two companies, in certain cases, at certain rates and charges, which agreement was made years ago and has been faithfully kept ever since.

The Southern Bell Company also seems to intend to extend, and to have taken steps looking towards running its lines from Richmond to points outside the State, as by its charter it had a right to do. See p. 89, section 6th of agreed facts, and p. 86 and 87 of the record.

The city of Richmond, some seven years after the company had erected its poles and wires and had been doing business, passed an ordinance on the 18th July, 1891, which undertook to give the Committee on Streets of said city the right to require the said company "to allow any other person or company to place upon its poles * * * any telegraph, telephone, electric light, electric power, electric car wires, or other wires

used in connection with the transmission of electricity." See p. 47 of the record.

The bill charges (p. 7 of record) and the answer admits that the city had no right to thus interfere with the rights of the company, and whilst the answer alleges that its motive in passing this ordinance was to lessen the number of poles on the street, there is no proof whatever of any such motive on the part of the city, or of any necessity for its existence, if the motive did exist. And the fact that it has since then chartered another company and allowed it to put poles on the said streets occupied by the appellee, "to put its poles alongside of, close to the poles of your orator, and has allowed said company to string its wires close to and in many instances touching the poles of your orator," charged in the Bill, not denied, and therefore by section 7 of the agreed facts admitted, negatives the assertion of the city on this point. Certain it is that there is no proof—indeed no claim—on the part of the city that the poles and wires of the company interfered with ordinary travel on the streets.

Cause of Controversy.

Matters rested thus until in 1894, (three years after the abandonment by the city of its effort to make the Appellee allow other companies to use its poles,) when a letter was written by the City Engineer of Richmond, W. E. Cutshaw, making a demand—"requirement" is the word used—on behalf of the Committee on Grounds and Buildings, for thirty stations free of charge. See p. 15 of the record. The company, by its letter found on page 16 of the record, called the attention of the committee to the fact that it paid the city an annual tax of $810, and was furnishing without charge a number of poles for carrying city wires and offered to furnish the 'phones "required" by the committee at half price. The committee immediately replied, through the City Engineer, W. E. Cutshaw, taking no notice of the offer of the company, but increasing the demand for free 'phones to the number of 39, and requiring an answer by 5 o'clock the Monday following. To this,

the company wrote a conciliatory letter on the 5th of November, 1894, showing the unreasonableness of the "requirements of the committee," and evidently suggesting negotiations by which some fair and reasonable understanding might be arrived at. The answer to this was an ordinance approved on the 14th December, 1894, by which the city undertook to repeal and revoke all the rights and privileges given the company, and prepared to drive it from the city. See p. 18 of record. Not only does the tone and temper of the two letters from W. E. Cutshaw, City Engineer, writing on behalf of the committee, communicating their peremptory and *increasing* "requirements" for free 'phones, convey a threat on their faces, but it is stated by Mr. McCluer, Superintendent of the company, in Bill Exhibit, No. 13, on page 84 of record, and not denied, that Mr. Cutshaw and other officers of the city intimated "quite broadly" on several occasions "during the summer and fall of 1894," whilst these demands were being made, that if the company did not give the city free 'phones, that the company would either be subject to a pole tax which would cost considerably more than the free telephones, or that an effort would be made to revoke the municipal franchise." The city promptly ratified and made these threats effectual, by carrying them out, and has undertaken to both revoke the municipal franchise of the company and put on it a heavy pole tax. The prompt and speedy action on its part carrying out the threats made by its officers, one of whom was making the demand and "requirements" for free 'phones in the name of the committee, not only justifies the mild admission of the answer of the city found on pages 43 and 44 of the record, in which it says, "It may be true one of your respondent's committees attempted to *induce* the complainant to furnish it with certain free 'phones," &c., but we most earnestly insist, sustains the position that the controversy in this case arose directly from the demands—or as they are called, "the requirements"—of the committee for free 'phones, and the refusal of the company to comply therewith. The threat of the officers of the city making the demand of the heavy pole tax and of the destruction of the company's busi-

ness (for the repeal of its franchises was intended as such) was almost immediately ratified and adopted and carried out by the city. Thus the controversy arose, and whatever other motives have been alleged by the city, the proof is as we have just stated.

The contention of the city that its harsh action was caused by the refusal of the company to submit to the provisions of the ordinance for the joint use of poles passed and abandoned more than three years before, is not only inconsistent with the long delay and acquiescence of the city after the refusal of the company to accept the provisions of this ordinance, but is also contradicted by the prompt action of the city, immediately following and carrying out the threatening demands and threats for the company's refusal to give the city free 'phones.

City Ordinances of 1895.

Having undertaken to take from the appellee its rights to "construct, maintain and operate" its lines in the city, the city then proceeded, by ordinances approved on September 10, 1895, found on pages 18 to 30 of the record, to "induce" (if we use the word applied by the defendants' answer to the threats of the committee's engineer, by which they sought to get free 'phones for the city) the appellee to abandon its rights (if it had any left) and obtain, or rather apply for a permission *de novo* to occupy the streets of the city under the most burdensome and unreasonable conditions (to all of which the company was to agree), one of which, in section 2 of ordinance on page 18 and 19, actually provided that if the company, failing to obtain such privilege as above required (to keep its poles and wires in the streets), shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th December, 1895, and restore the streets to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than $5 nor more than $100 for every such pole so remaining in the street or alley, to be imposed by the Police Justice of the city; each day's failure to be a separate offence.

The first and second sections of this ordinance provide as follows:

Be it ordained by the Council of the city of Richmond—

1. That all poles now erected in the streets or alleys of the city of Richmond, for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances, to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth.

2. No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley; to be imposed by the Police Justice of the city; each day's failure to be a separate offence.

This ordinance required the company to petition for "the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the Council may see fit to impose." In other words, the company must not only abandon all its right which it now holds, whether under the Statutes of the United States of 1866, under the State law of Virginia, or under the ordinances of the city of Richmond of 1884, but must petition for what privileges it wants "in accordance with the conditions of this ordinance

and such other conditions as the Council may see fit to impose."

And the very first condition mentioned in the same section provides that if the Council doesn't see fit to grant the petition of the company, that the company is to remove (and thus destroy) its plant which has cost it thousands of dollars, and be subjected to ruinous fines for failing to do so.

Had the company filed any such petition as this, it would have delivered itself bound hand and foot into the power of the city, whether it granted or refused its application. We have seen what would have been the effect if the city had chosen to refuse, viz: utter and complete destruction of all the company's property in the city, and the ordinance is so drawn as to make the company, by its petition, consent beforehand to this destruction, which it is afterwards under threat, or, if a milder word is preferred, "inducement" of ruinous penalties, to inflict on itself. But suppose the city should choose to grant the prayer of the petition thus offered, what sort of a franchise would the company have?

1st. The Committee on Streets could require the company to allow other persons or companies to put such wires upon its poles as "will not, in the opinion of said committee, unreasonably interfere with the business of the person owning such poles, and upon such terms and conditions as may be agreed upon" between the parties interested, &c. See section 3 of ordinance, page 19 of Record. Observe that the committee is made absolute judge as to how much interference with the company's business is to be allowed. Some interference seems to be expected and intended, but all the restriction imposed on this is that, *in the opinion of the committee*, this should not be unreasonable.

It will be noticed that there is not only no provision for an appeal to the courts, but an express provision, to which the company was to agree beforehand, that the committee was to be the sole arbitrator, and its action in this matter, however unreasonable, however improper, was to be final.

Again, in case the company already having poles and the company or person desiring to use them (who would often be their rivals in business) could not agree on the terms and conditions on which the latter is to use the poles of the former, they shall appoint two arbitrators, who shall select a third arbitrator, and if there is difficulty in selecting the tribunal in this way, which might easily be the case, then the City Engineer—the same gentleman who wrote for the committee the letters "requiring" free 'phones, and tried thereby, as well as by threats to the superintendent of the company, to "induce," as the city's answer terms it, the company to give the free 'phones—is to select the man or men who would have the decision of this vital question.

Section 4 of the ordinance, on page 21, gives the City Engineer absolute and final power to determine the size, quality, character, number, location, condition, appearance and manner of erecting of all poles. No provision is made to control or appeal from his decision, however unreasonable, however arbitrary it may be.

Section 7 gives the City Council the right to put other restrictions and regulations as to the erection of and use of poles, and to require the wires to be put into conduits, "upon such terms as the city may deem proper." No provision is made to supervise or appeal from what the city deems proper in this respect; but the party who, by his petition, has agreed to all these provisions, as by the terms of his petition he would have to do, is to submit absolutely to what the "city may deem proper."

Then follow other provisions, among them the threatened pole tax.

The ordinance providing for the wires to be put in underground conduits was suspended by action of the City Council at the time the bill in this case was filed, until the 15th June, 1897, and whether it is now in force or still further extended we do not know, but it also contains many unreasonable and void provisions.

It is stated in the brief of counsel for the appellant that this

ordinance applied to the streets in the busier and more crowded portion of the city. Not only is there no proof of this in the record, but there is no proof, not even a claim, made on behalf of the city that (using the language of the United States Statute of 1866) "ordinary travel" was "interfered with."

The ordinance found on page 21 directs the poles to be removed and put in conduits under the streets of the city. The city does not provide the conduits, and is not even satisfied with the order given to the company to make conduits for its own wires, but requires it to provide at least one conduit for all the city wires, and more if necessary, free of charge, and to make a conduit 100 per cent. larger than is needed, which is to be used by other companies at such rates as may be agreed on by arbitration, by a board to be composed of three persons, one of whom is to be appointed by the company, one by the new company (desiring to occupy the conduit), and the third to be selected by the first two, and if they disagree, which would be very probable we should say, then he is to be selected by the City Engineer. These provisions appear in sections 2 and 4 of the ordinance.

Section 5 provides that, at the end of fifteen years, the city may put such other restrictions, conditions and charges as it may see fit and shall be lawful, or may order the removal of the wires from the conduits if it chooses.

Section 6 imposes a charge of $2.00 per wire per mile on wires in these conduits.

Section 7 provides for the extension of the conduits as the city may require.

That these ordinances are unreasonable and void is, we submit, clear.

First. We say that the city has no power to put telephone wires under ground. The Statute of the State authorizing telephone companies to occupy the streets of a city uses the words "along or *over*—not under. See section 1287 of the Code of Virginia of 1887, and the case of *Wheat* v. *The City of Alexandria*, 88 Va., 742, decides: The right to dig up streets for the purpose of laying water or gas pipes is a franchise which can only be

granted by the Legislature, or city under legislative anthority, and holds that in that case no such power existed.

The city of Richmond may have power to put pipes and conduits for water and gas under ground, but no power is given it, to put telephone wires there, and the act of the Legislature seems to intend them to be over the streets—not under. See Code of Virginia, 1887, section 1287.

"Sec. 1287. *Right of Telegraph and Telephone Companies to construct and operate lines.*—Every telegraph and every telephone company incorporated by this or any other State, or by the United States, may construct, maintain, and operate its lines along any of the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided the ordinary use of such roads, works, railroads, and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the Council thereof."

SECOND. By these ordinances we insist the company would, if it had to come under them, submit all its rights and franchises to the mercy of the city; it would itself have to go to an enormous expense in providing conduits under the streets, not only for its own wires and the wires of the city, but for the wires of its rivals, who could come in and occupy the conduits by paying a price which might, and probably would, be fixed by a board of three arbitrators, two of whom were appointed by the City Engineer and the rival company; and it is to pay the city $2.00 per wire per mile for the privilege of being allowed to occupy a portion of the conduit when built; but harsh and unreasonable as are these conditions, they may be still harsher and more unreasonable at the end of fifteen years, when, if the city chooses, all remnant of rights of the company—if by that time any are left—may be taken away.

As to the poles which are to be allowed to remain above ground, the company can only be allowed to have their use in the event that the city chooses to allow it, after petition for that purpose shall have been made. The language is: "Un-

less the owner or user of such pole shall first have petitioned for and obtained the privilege of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance and such other conditions as the Council may see fit to impose." Were this petition made and granted, not only would the rights of the company be subject to all the provisions and restrictions as to joint use of poles and charges provided for in the ordinance, but would submit itself to "such other conditions as the Council may see fit to impose." And if the city saw fit to reject its application, or if the company does not make it at all, then all its poles and wires must be removed. These ordinances are not only unreasonable, but if they do not actually at the present time destroy absolutely all the rights and property of the defendant company, they clearly put it in the power of the city to do so in the future, and were the company to petition under these ordinances, as the city insists it should do, it would, we submit, have to agree beforehand, in doing so, to surrender every right it now has to the city and become a mere dependent on its favor, which might be withdrawn at any time, even if now granted. This is confessedly the position it would occupy if its application is allowed, after fifteen years had passed, under the fifth section of the ordinance, found at P. 30 of the record.

This, we submit, is not an exercise of the police power of the city to regulate the rights of the company, but a demand by the city for the company's consent to destroy its rights and property whenever it may see fit to do so.

Questions in Issue.

The question in this case is however at present, not how much if any of those ordinances are valid, but whether the city can, as it claims the right to do, drive the company from its streets and destroy its property held under the Constitution and laws of the United States and of the State of Virginia, as well as under the city ordinances, if the company refuses to come in and by the petition provided for it by the ordinance of 1895, abandon all its rights then exist-

ing, and ask for such rights as the city may choose to give, with no certainty that any will be given, and with a certainty that if given, they will be subject not only to the burdensome conditions imposed in the ordinances, but that they are subject to such other conditions as the Council may see fit to impose. Sec. 2 of the Ordinance, p. 19 of record.

The city's position is, not that the company refuses to obey the provisions of the ordinances, many of which it may be ready to comply with, but that it is a trespasser, has no rights at all in its streets, and does not come under these ordinances at all. The city actually refuses to make any reply to applications to replace or repair poles along its routes which have become dangerous (see statement in the bill on page 11).

The bill charges, pages 11 and 12, as follows:

"Your orator further charges that said city claims the right not only to prevent your orator from extending its lines along other streets and alleys in said city, from connecting new subscribers along its routes now used and occupied, from putting up new additional wires along said routes, from replacing old and defective poles and wires along the routes now used by it with new ones, but claims the right to compel your orator to remove said poles and wires now used by it, and cut them down itself, if it should see fit, and though your orator had made application to the proper authorities of said city to designate the character of poles as under the 4th Section of an ordinance of said city, approved 10th Sept., 1895, they are required to do, to be put in the place of poles which are defective and dangerous along its routes, not only was this request not noticed, but the response has been a resolution by the Street Committee passed upon the statement of one of the committee that 'the time had now arrived to take some decisive action to rid the streets of your orator's poles.'"

This statement, not being denied or questioned by the answer, is admitted to be correct under article 7 of the agreed facts, page 90 of the Record; and shows clearly that the city

is taking the ground that the company must, before it can claim any rights or privileges under these ordinances, file its petition, agreeing beforehand to take just such rights as the city chooses to give it, subject to just such future changes or "such other conditions as the Council may see fit to impose," if it chooses to give even this much, and if not, why then the trespasser is at its mercy to be dealt with according to its sovereign will and pleasure. The company, on the other hand, claims that it holds its rights and position in the streets of the city, under the Constitution and Laws of the United States, of the State of Virginia, and under the ordinance of the city of Richmond, and the court having, after careful consideration come to the conclusion that its rights under the Laws and Constitution of the United States entitled it "to construct, maintain and operate" its lines in the city, has, without going into the question of how far its rights were protected by the laws of Virginia, and by the city ordinances, so decreed.

It has not said which of the provisions of the ordinances were valid, and which were not, because there was no need at present to do so. It has merely said, you can't drive this company from your streets, you can't destroy its franchise and property.

When you recognize its right to "construct, maintain and operate," its lines on your streets, it is time enough to decide, what and how much control you have over it. The question —the only question—now is, whether the company has a right to "construct, maintain and operate its lines over and along the streets" of the city.

This is all the Circuit Court decided by its decree of the 23rd of August, 1897, on page 91 of the Record, which reads as follows:

Decree of Circuit Court, August 23, 1897.

"The court without passing on the rights claimed by the complainant company under the laws of Virginia, and the ordinances of the city of Richmond, is of opinion, and doth adjudge, order and decree that the complainant company has,

in accordance with the terms and provisions and under the protection of the Act of Congress of the United States, approved July 24, 1866 (which is an authority paramount and superior to any State law, or city ordinances in conflict therewith), the right 'to construct, maintain and operate its lines over and along,' the streets and alleys of the city of Richmond, both those now occupied by the complainant company, and those not now so occupied, and to put up, renew, replace and repair its lines, poles and wires over and along said streets and alleys, as well as to maintain, construct and operate the same, and to connect its lines with new subscribers along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights.

"And the court doth adjudge, order and decree that the defendant do pay to the complainant its costs in this suit incurred, to be taxed by the clerk, and this cause is ordered to be removed from the docket and placed among the ended causes, but with liberty to either party hereto, on ten days' notice to the other, to reinstate this cause on the docket of this court on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

Shortly after this decree was entered the city made an effort to have the court modify and limit its decision so as to limit the right of the company to maintain its lines for the sole purpose of transmitting and receiving messages coming from and going to points outside of the State of Virginia, to and from the city of Richmond, thus making a distinction between local and interstate business, although no such distinction is made

or even attempted to be made by any of the ordinances of the city of Richmond, against which relief is sought in this case; which premature application on the part of the city was properly refused by the court. See page 92 of the record.

The last decree mentioned, entered on the 28th of August, 1897, by the Circuit Court, in which it refused to modify its decree of the 23d August, 1897, *was never appealed from, was therefore not before the Circuit Court of Appeals and is not now before this court for review.*

The decree of the 23d August, 1897, entered by the Circuit Court, was reversed at the instance of the city of Richmond by the Circuit Court of Appeals because, in the opinion of the latter court, it failed sufficiently to recognize the right of the city to exercise proper police power over the company. Page 111 of the record and 113 of the record. It will be thus seen that even if the decree of the Circuit Court could have been complained of by the city on this ground, the decree of the Circuit Court of Appeals, to which it is now objecting, recognizes, in unmistakable terms, the rights of the city in this regard.

Indeed, it is not perceived how the decree of the Circuit Court, even before its reversal and modification, could have interfered with the proper exercise of the police power of the city of Richmond. No claim was ever made by the company, either in its bill or in the presentation of its case in argument before the court, that its rights were superior to the exercise of the police power of the city, except where there was a conflict between the rights given the company under the act of Congress of 1866, under which it claims, and the exercise of said police power. If there is such conflict, then, of course, the act of Congress and the rights under it are paramount. See *W. U. Tel. Co.* v. *Pendleton*, 122 U. S., where this court said, page 259, "The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly under the reserved powers of the State, which are designated under that somewhat ambiguous term of 'police power,' regulations may be

prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations in respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution." See also *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S., in which this court held that whilst the State of Massachusetts had the power to tax the company, it could not, in enforcing this tax, interfere by injunction with the right of the company to carry on its business, because this right was given it under the act of Congress.

The decree of the Circuit Court recognizes this right of the city, and merely says that the company "has in accordance with its terms and provisions and under the protection of the Act of Congress of the United States, approved the 24th of July, 1866 (which is an authority paramount and superior to any State law or ordinance in conflict therewith), the right to construct, maintain, and operate over and along the streets and alleys of the city of Richmond," &c.

We do not well see how the court could have more clearly limited the right which is allowed the company to those given it by the Act of Congress, using, as it does, the very words of the act—"to construct, maintain, and operate its line over and along"—and that portion of the decree which enjoins the city from interfering with the rights of the company is equally guarded; enjoining the city "from preventing or interfering with the exercise of the *aforesaid rights* by the complainant company," and from inflicting fines on said company for exercising its "*said rights.*"

What rights were thus protected from interference of the city of Richmond? Clearly only those rights given and guaranteed to the company by the Act of Congress of 1866, to-wit: the right to construct, maintain, and operate its lines, &c., in accordance with the terms and provisions of that act. Not one word said, or intended to be said, which would free the company from all proper police regulations not in conflict with its rights under said act.

The fact is, that the contest in this case between the city and the company is not, and never has been, as to whether certain provisions of an ordinance were valid or not, in which the court was asked to decide one section to be valid and another not (even if this could be done with reference to these ordinances, which require the company, before claiming any rights under them, to file a petition consenting in advance to all their provisions present and future, and that the city may hereafter impose such regulations and provisions as it sees fit on it); but it was to decide simply whether the company was to be allowed, under the terms of the act of 1866, to construct, maintain, and operate its lines, at all, in the city of Richmond. Whether, in fact, the company could exist there, except by agreeing beforehand to surrender all of its rights, whether under this act or under the State law and city ordinances to the city, and take just such rights as the city now chooses, and may choose in the future, to allow. The city refuses to allow any of the provisions of these ordinances to apply to the company, having even refused to designate the kind of poles to be put in the place of those which have become dangerous and unfit for use, and takes the ground that the company is a mere trespasser on its streets, whose existence has been forfeited, and which is under sentence of death.

That this was, and is, the real controversy in this case, and was, and is, the point decided in favor of the company in both the Circuit Court and the Circuit Court of Appeals, is not only manifest from the whole record, pleadings and proof, but also appears from the closing lines of the decree of the Circuit Court, which provide for the reinstatement of the case on the docket on motion, "for the purpose of enforcing and specifically defining, should it become necessary, their (the parties) respective rights under this decree." This shows that the court thought, as the company earnestly hoped would be the case, that when the question of the right of the company to construct, maintain and operate its lines, in other words, to exist, was settled and established in its favor, that there would be a settlement of the minor questions, such as taxes, &c.,

without further litigation between the parties, but in order to provide for such further controversy, should it arise, the right of either party to apply to the court was reserved. This provision, which we think was clear, in the order of the Circuit Court, is made still more clear and emphatic by the decree (page 113) and the opinion (page 111) of the Circuit Court of Appeals, which provides expressly for "the recognition of a proper exercise of the police power of municipal corporations," and that the use by the company of its poles and wires must "be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond in the proper and lawful exercise of the police power."

Surely here is an express and clear recognition of the right of the city to "the proper and lawful exercise of the police powers;" and unless the city claims the right to exercise its police power, untrammeled by these restrictions, to-wit: to exercise this power, whether lawful and proper or not, it should be satisfied with the decision. The opinion of the Circuit Court of Appeals, found on pages 109 to 112 inclusive, treats of this subject.

All that the Circuit Court of Appeals was called on to decide in this case, all that it could properly decide, and all that it has decided, is that the city can not, by these ordinances, deprive the company of its existence and right to do business in the city, because it declines to consent by signing the petition prescribed, to surrender its rights for the present and future to the untrammeled will of the city, and that the effort on the part of the city to do this is not the proper and legal exercise of its police power. When the city admits the right of the company to its existence here, without its signing such an application abandoning its rights, and undertakes to exercise its police power, it will be the duty of the company, and we doubt not its desire, to obey and conform to all reasonable, proper and lawful ordinances not in conflict with its rights guaranteed to it under the laws of Congress and the State of Virginia, and if it does not do so, the court will compel it.

Some stress is laid by the appellant's brief on the right of

the city to interfere with the local business of the company, as distinguished from its interstate business, which they say is prohibited by the court.

1st. We insist that until the city by some ordinance undertakes to regulate the local business separate and apart from the interstate business, it cannot raise such a question. The ordinances before the court over which the contest here has arisen, and been decided, make no distinction between interstate and local business. The application, therefore, of the city for a modification of the order of the lower court, found on page 92 of the Record, was improper, and asked the court to decide simply a moot question—one not before it,—and which did not arise and could not arise under the ordinances then in force, and it was properly objected to by counsel for the company and properly refused by the Circuit Court.

2nd. We find nothing in the language either of the decree or the opinion of the Circuit Court of Appeals, to indicate that it concurred with the court below in the reasons it gave for refusing to modify this decree in this respect. The decision of the court below was reversed in so far as to make it clear (the Circuit Court of Appeals seeming to think there was doubt about it) that the city was to have a right to exercise proper and lawful police power.

Indeed the order of the Circuit Court, entered on the 28th of August, 1897, page 92 of the Record, which seems so peculiarly objectionable to the appellant, *was not before the Circuit Court of Appeals* at all, never having been appealed from, and is not now before this court.

3rd. But if the point about allowing the city to prohibit the sending of local messages could have been considered and decided by either of the courts below (separately and distinct from the interstate business done by the company), in the absence of any ordinance of the city separating the two, the decree of August 28, 1897, was right. This brings us to the question of the scope and constitutionality of the Act of Congress of 1866. So much of the said act as applies to the case at bar is as follows:

Act of Congress of July 24, 1866.

"An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the same for Postal, Military, and other Purposes.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads. * * * *

"Sec. 2. And be it further enacted, that telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"Sec. 3. And be it further enacted, that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act."

The Circuit Court rested its opinion and decree of August 23, 1897, upon the paramount authority of this act of Congress, and without at that time passing on the rights claimed by the appellee under the laws of Virginia, and the ordinances of the city of Richmond, decreed in substance that appellee, in accordance with the terms and provisions and under the protection of the act of Congress approved July 24th, 1866, has the right to construct, maintain, and operate its lines over and along the streets and alleys of the city of Richmond, and restrained the city of Richmond from removing or injuring said lines, from interfering with the exercise of the *aforesaid* rights, and from enforcing penalties on appellee for exercising its *said* rights, and removed the cause from its docket, but with liberty to either party thereto on ten days' notice to the other to reinstate the cause on the docket of the court for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under said decree.

The Circuit Court, without passing upon the Virginia Statutes and city ordinances, declared in substance that the appellee could not be absolutely driven from the post roads (streets and alleys) of the city of Richmond. It so framed its decree of August 23, 1897, that the city of Richmond might have a further decree in respect to these matters should it thereafter so desire.

From the decree of the Circuit Court (the full text of which may be found at p. 20 of this brief) an appeal was taken by the City of Richmond to the Circuit Court of Appeals for the Fourth Circuit. The cause was argued at the November Term 1897, and at the February Term 1898—the latter court reversed the decree of the Circuit Court and remanded the cause to the

Circuit Court "with instructions to modify the terms of the injunction therein granted so that it may conform to the principles declared in the opinion of this court."

The Circuit Court of Appeals while recognizing the right of the appellee, under the Act of Congress of July 24th, 1866, to construct, maintain and operate its lines upon the post roads (streets and alleys) of the City of Richmond, deemed it best to recognize at some length in its opinion the police power of the City of Richmond. The full text of its opinion may be found at marginal pages 102 to 112 of the record.

Extracts from Opinion of Circuit Court of Appeals.

At p. 110 the court said:

"The complainant, under the act of Congress, has the right to use these highways. Neither the State, nor any municipality can prevent it. But this use must be subordinate to the rights of the public, must not endanger those rights. And as the municipality is the guardian of the public in this regard, it can establish such lawful provisions as may regulate the use, always, however, avoiding such regulations as will make the use burdensome and intolerable, and so practically impossible. * *

"This being so, the injunction granted by the Circuit Court is too broad in its language and effect. There should have been the recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the City Council of Richmond, in the proper and lawful exercise of the police power.

"The only remaining question is, do the ordinances of the city of Richmond prescribe regulations which will make the use burdensome and intolerable, and practically impossible?"

And after some discussion of the ordinances of the city of Richmond, the court, at page 112, said:

* * * "Now it goes without saying that if the complain-

ant, notwithstanding its claim of protection under the Act of Congress of 1866, were willing to file a petition to the City Council for the privilege of using its streets and alleys, and in that petition agreed, in consideration of its grant, to abide by any present or future condition, regulation or restriction the Council may impose, this would be a binding contract and would control the complainant. *R. R. Co.* v. *Ryan*, 153 U. S., 436. Whatever the rights of the complainant may have been under such a stipulation, it would surrender them and come within the absolute domination of the City Council. The courts could not review any ordinance to discover if it be within the lawful exercise of the police power, for the complainant would be bound by its contract to obey the ordinance, be it a police regulation or not.

"These conditions, regulations and restrictions already prescribed by the City Council appear to be stimulated by a desire to oppress and control, perhaps defeat, the existence of the complainant, and so are not the lawful exercise of the police power.

"Let the case be remanded to the Circuit Court with instructions to modify the terms of the injunction therein granted, so that it may conform to the principles declared in this opinion, the costs of the case to be equally divided between the parties."

We are met at the threshold with the question whether a Telephone Company is a Telegraph Company, and whether Telephone Companies and Telephone Lines come within the protecting power of the Act of Congress of July 24th, 1866. On this point the opinion of the Circuit Court of Appeals, marginal pp. 108 109, is as follows:

Extract from Opinion of Circuit Court of Appeals.

"The act of Congress of 1866, in terms, speaks of telegraph companies. Do these words include telephone companies?

"The telegraph and telephone both communicate messages by means of electricity over wires, for longer or shorter dis-

tances. The telegraph communicates these messages by sound of instruments, the telephone by the human voice usually. Both depend upon electricity for their action. Each is but a form of use—the product and result of the same principle. The names are only used to distinguish the method of communication.

"In England, in the case of *Attorney-General* v. *Edison Telephone Co.*, 6 Q. B. Div., 244, Stephens, J., in a carefully prepared and elaborate discussion, says: 'I do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.'

"In the *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wis., 32, this case was cited with full approval, and the doctrine asserted that, in contemplation of law, a telephone and telegraph company are one and the same. In the case of the *Chesapeake & Potomac Telegraph Co.* v. *B. & O. Telegraph Co.*, 66 Maryland, 410, the court of last resort of that State quote, with approval, the English case above quoted, and say farther: 'It is clear if we take the term telegraph to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone.'

"The same doctrine is clearly and fully expressed in *Duke* v. *Central N. J. Telephone Co.*, 53 N. J. Law Reports, 341. The court quotes the language of Bell in his application for a patent, set out in the Telephone Cases 126 U. S., I. He says: 'What I claim is the method or any apparatus for transmitting vocal or other sounds telegraphically as herein described, by

causing electrical undulations similar in form to the vibrations of air accompanying said vocal sounds.'

"And so also Brown, J., now Mr. Justice Brown, in *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. Rep., 273, says: 'We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company.'

"The complainant, therefore, comes within the protection, and is entitled to the privileges of the act of 1866."

Extracts from cases cited by the Circuit Court of Appeals in its opinion, and also from 135 New York, 404, holding that Telephone Companies are Telegraph Companies.

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6 Q. B. D., 244.

Subject: Telephone Co. is Telegraph Co.

In *Attorney General* v. *Edison Telephone Co.*, 6 Queen Bench, Div. 244, Stephen, J., in an elaborate and exhaustive opinion, said:

"We do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say, that whatever may be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone, establishes any material distinction between telephonic and telegraphic communication, as the transmission if it takes place, is performed by a wire acted on by electricity."

* * * * * * *

"That this view does no violence to the common use of language is proved, first, by the fact that, in Mr. Edison's own specifiation, the words 'telegraph' and 'telegraphic,' are fre-

quently used in reference to his invention, and that in Webster's Dictionary, published in 1856, an electro-magnetic telegraph is defined (under the head 'Telegraph'), as an instrument or apparatus for communicating words or language to a distance by the use of electricity, and (under the head 'Electro-magnetic telegraph'), as 'an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning.'"

* * * * * * *

"In this connection we may dispose of one or two minor arguments by which it was attempted to draw a distinction between telephonic messages and telegrams. It was said to be essential to a telegraphic message that it should be sent not direct from party to party, but through the intervention of a messenger or clerk, and also that it should consist of signals having a conventional meaning, and not of actual words spoken. It seems to us impossible to regard these matters as essential to the process. A clerk may be regarded merely as an extra link in a chain of communication, and signals are only imperfect substitutes for words. It would be a strange thing to say that improvements by which a step in a given process can be dispensed with, and by which the process itself may be perfected, destroy the character of the process. To take such a view would be to affirm that imperfections in an instrument are essential parts of it, and that their removal destroys it *"

The American decisions are equally as emphatic.

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62 Wis., 32.

Subject: Telephone Co. is Telegraph Co.

In *The Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wisconsin, pp. 32–37, the Supreme Court of Wisconsin said:

"As for the difference in the mode of communication by means of telegraphic and telephonic apparatus, see *Attorney-*

General v. *Edison Telephone Co. of London*, L. R., 6 Q. B., Div. 244. In that case Mr. Stephen, one of the judges of the Exchequer Division of the High Court of Justice, who, unlike most American judges, seems to have sufficient time not only to satisfy his own curiosity, but the curiosity of all the curious, has given a very lengthy and definite discussion of that subject. In that case the court conclude that Edison's telephone was a telegraph, within the meaning of the telegraph acts, although the telephone was not invented nor contemplated when those acts were passed. It is there said, in effect, that the mere 'fact, if it is a fact, that sound itself is transmitted by the telephone, establishes' no 'material distinction between telephonic and telegraphic communication, as the transmission, if it takes place, is performed by a wire acted on by electricity.' It is there further said that, 'of course no one supposes that the Legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear, that they actually did use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence.' **It is upon this theory of progressive construction that the powers conferred upon Congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service, known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of communications by telegraph. Pensacola Tel. Co. vs. W. U. Tel. Co., 96 U. S., 1.**

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66 Md., 410.

Subject: Telephone Co. is Telegraph Co.

In the case of *Chesapeake & Potomac Telegraph Co.* v. *Balti-*

more & Ohio Telegraph Co., 66 Maryland, 410, the Supreme Court of Maryland said:

"This latter act is supposed to have been passed in order to remove all possible doubt as to the authority, under the general incorporation law, for incorporating telephone companies. **But it is clear, if we take the term 'telegraph' to mean and include any apparatus or adjustment of instruments for transmitting messages or other communications by means of electric currents and signals, that term is comprehensive enough to embrace the telephone.** And that the telephone is so embraced within the definition of the telegraph has been expressly decided in England, after the most careful analysis and comparison of the different instrumentalities, and the manner of using them, in the two systems. *Attorney-General* v. *Edison Telph. Co.*, 6 Q. B. Div. 244.

"Therefore, notwithstanding the appellant was **organized as a telegraph company**, under the general incorporation law, before the passage of the act of 1884, ch. 360, **it was, and still is, fully authorized to do a general telephone business; and, in doing such business, it is subject to the provisions of the general incorporation laws that apply to telegraph companies.**"

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53 N. J. L. Rep., 341.

Subject: Telephone Co. is Telegraph Co.

In *Duke* v. *Central New Jersey Telephone Co.*, 53 New Jersey Law Reports, 341, Reed, Judge, in delivering the opinion of the court, said:

"The substantial identity of these methods of transmitting thought is not a novel view of their character.

"The notion of the discoverer of the newer method seems to have been that it was a new use to which the system of telegraphy could be applied.

"Mr. Bell's specification of his claims in his first petition for a patent is set out in full in the statement of facts prefixed

to the opinions in the telephone cases, 126, U. S., 1. In it he says: ' What I claim is (5) the method or an apparatus for transmitting vocal or other sounds telegraphically, as herein described, by causing electrical undulations similar in form to the vibrations of air accompanying the said vocal sounds.'

" Judicial sentiment, whenever an occasion has arisen for its expression, has uniformly been in the same direction.

" In the case of *Attorney-General* v. *The Edison Telephone Company of London*, 6 Q. B. D., 244, the court was called upon to consider the relations which the two systems of communication bore to each other, in respect to identity of operation.

" Certain acts passed before the invention of the telephone conferred upon the Postmaster-General of Great Britain the exclusive privilege of transmitting telegrams within the United Kingdoms, and of performing all the incidental service of receiving, collecting or delivering telegrams. There were in the acts certain definitions of what should be included in the words ' telegraph ' and ' telegrams,' but all these definitions were descriptive of a telegraphic service by signaling. The question was whether the telephonic transmission of intelligence by the Edison Telephone Company was an infringement upon the monopoly previously granted to the Postmaster-General.

" In an opinion by Mr. Justice Stephens, the scientific methods and mechanical appliances employed by each were reviewed in an exhaustive opinion. He sums up his observations by saying: ' We are of opinion, then, that fully admitting all that has been or, indeed, can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire and receiver, taken together, form a wire used for the purpose of telegraphic communication, with apparatus connected therewith for telegraphic communication.

"Again, he says : ' The great object of the act of 1863, was to give special powers to telegraph companies to enable them to open streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The act was in-

tended to confer powers and to impose duties upom companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the extent and nature of those powers and duties were made dependent upon the means employed for the purpose of giving the information."

This learned Judge then quotes from the cases above cited, 62 Wis., 32, and 66 Md., 399, to sustain his opinion, and, on p. 348, says:

"No one can read the line of argument by which the conclusions in these cases were reached without perceiving a concensus of judicial opinion that the device introduced by the discovery of the electric transmission of sounds is but a novel method of accomplishing the object for which telegraphs were erected, and that a corporation erected under an act which empowers it to conduct a line of telegraph can conduct it by means of a system, which for philological and scientific distinction is called a telephone.

"In this view I concur.

"The improvements, indeed the revolution in the methods of transacting the business of each of the great corporations, has never given rise to a suspicion that the use of these additional means of accomplishing its corporate purpose was not within the limits of its corporate functions."

In this case the court actually went so far as to allow Telephone Companies to exercise rights of eminent domain, which were given by statute to Telegraph Companies.

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42 Fed. R., 273.

Subject: Telephone Co is Telegraph Co.

In *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed. R., 273, Judge Brown, now one of the justices of the U. S. Supreme Court, said: * * *

"We see no reason to doubt the position assumed by the complainant, that a telephone company is a telegraph company, and that, under its right to construct and operate telegraphs, it was empowered to establish a telephone service. *Attorney General* v. *Telephone Co.*, 6 Q. B. Div., 244: *Telephone Co.* v. *City of Oshkosh*, 62 Wis., 3; 21 N. W. Rep., 828."

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135 New York, 393.

Subject: Telephone Co. is Telegraph Co.

In *H. R. T. Co.* v. *W. T. & R. Co.*, 135 New York, 393, the court, at pp. 404–5, said:

"* * * At that time, and for twenty years afterwards, the art of telegraphy, as known and practiced, did not include the transmission of human speech by means of the telephone over wires strung upon poles. But it has been held in other States and countries, and, as we think, rightly, that this form of transmitting messages through the medium of an electric current passing over extended wires, is authorized by a statute for the incorporation of telegraph companies, although when the act was passed such form of communication was unknown. (*Wisconsin Telephone Co.* v. *Oshkosh*, 62 Wis., 32; *Cumberland Telephone & Tel. Co.* v. *United Electric Railway Co.*, 42 Fed. Rep., 273; *Attorney-General* v. *Edison Telephone Co.*, L. R. [6 Q. B. D.], 244.)"

Wherever the question has arisen (whether in England or America), it has been held that Telephone Companies and Telegraph Companies stand upon the same footing. The authorities are unanimous in support of this contention. We have found no decision holding otherwise.

In addition to the decisions of the courts in England and in the United States, which are, we submit, conclusive of the question that telephone and telegraph companies are for all purposes embraced in the act of July 24, 1866—the same, and that the expression in this act—of the words—any telegraph

company includes necessarily telephone companies, we beg the court to notice the following matters bearing on this point:

1st. On page 53 of record, Article 18 of Statement of Evidence, is a statement that the patents used by the appellee are the patents referred to in the telephone cases in 126 U. S. Reports, and copies of these patents and the specifications, drawings, &c., as shown in said 126 United States Reports, from pages 4 to 23 inclusive, are to be considered as evidence in this case. By reference to this book on pages 4 and 5, will be found the following, under the words "Bell's Patent of March 7th, 1876.—A. G. Bell."—"Telegraphy"—and on page 6 the case is headed "Improvement in Telegraphy," and the specifications on the same page described the invention as "Improvement in Telegraphy," and so on throughout the specifications and applications for the patents which the appellee uses—they are spoken of and referred to as "Improvements in Telegraphy" and as "Electric Telegraphy," &c.

2nd. The appellee is chartered under the New York Act of Legislature providing for the incorporation and regulation of telegraph companies, page 55 of record. Its name and official title is "Southern Bell Telephone and *Telegraph* Company." Its lines are spoken of in its charter as the "lines of telegraph of this Association." It thus appears that it was chartered on the 11th of December, 1879, under the Telegraph Laws of New York, was called a telegraph company, and its lines called telegraph lines, and has done its business under this charter in numerous States of the United States ever since.

3rd. Being thus chartered and thus engaged, it was allowed by the Postmaster-General of the United States, Don M. Dickinson, himself an able lawyer, to accept the provisions and come under the protection of the Act of Congress of 24th July, 1866. See pages 59 and 60 of record. We have here then, in addition to the decisions of the courts, the concurrent opinion of the Postoffice Department and of the Patent Office Department of the United States, not only that telephone and telegraph companies are to be considered the same, and that

one is embraced by the other, but the decision of the former department that *this company is entitled to come under the protection of the Act of July 24, 1866.* Nor is this all, for

4th. It is clear from article 6 of the agreement between the Western Union Telegraph Company and the National Bell Telephone Company, made on the 10th of November, 1879, pages 60–61 of the record, that the Western Union Telegraph Company had been engaged in the telephone business, because it is agreed thereby that it should "withdraw from the manufacture, rental and use of telephones," except as provided for in this contract—so that the telegraph company claimed, and was exercising, before 1879, the right under its charter to use the telephone patents and do a telephone business.

The decisions of the courts need nothing to sustain them, but they are abundantly sustained by the charter of the company, by a long, uninterrupted and unquestioned course of business of the company by which it has done a telephone business under a charter gotten under laws providing for the charter of telegraph companies, by the action of the Western Union Telegraph Company in doing a telephone business under its charter, and by the action of both the Patent Office and Postmaster-General's Office of the United States, the last of which was by law charged with the duty of passing on the question of whether this company should be allowed to come under the provisions and protection of the act of 1866.

Surely here is support, and abundant support, if any is needed to sustain the unbroken line of decisions in our favor on this point.

The brief of the appellant, page 28, seems to rely on the definition of the word telephone as given in the contract found on page 61 of the record, article 2, section 1, as showing that telephone and telegraph companies are different kinds of instrumentalities. The language of the contract is, "the word telephone *as used in this contract*, refers to an instrument for electrically transmitting or receiving articulate speech." (Italics

ours). Thus showing, we insist, that the draftsman of the agreement had in his mind the opinion that unless he defined the word telephone as he intended to use it "in this contract," that the broader and more common meaning would be adopted. This rather strengthens than weakens the position of the appellee.

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1. What are the powers of Congress under Article I, Section VIII, of the Constitution of the United States?

2. Did Congress have power and authority to enact the statute approved July 24, 1866, if, according to a true construction of the language employed, it gives the appellee the right to construct, maintain and operate its lines over and along the streets and alleys of the city of Richmond, which are post roads.

3. Does the Act of Congress of July 24, 1866, embrace within its scope Telephone Companies, i. e., the appellee in the case at bar?

THE CHIEF POWERS OF CONGRESS UNDER THE CONSTITUTION OF THE UNITED STATES ARE DERIVED FROM THE EIGHTH SECTION OF ARTICLE ONE OF THAT INSTRUMENT.

Constitution of United States.

Article I, Sec. VIII.

"Section VIII. The Congress shall have power."

* * * * * *

"3. To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes."

* * * * * *

"7. To establish Post Offices and post Roads."

* * * * * *

"18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

1. What are the powers of Congress under Article 1, Section VIII, of the Constitution of the United States.

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4 Wheat., 316.

Subject: Construction and Application of Constitution.

In *McCulloch* v. *Maryland*, 4 Wheaton, p. 316, Chief-Justice Marshall prefaced his opinion by declaring that the Constitution in its most interesting and vital part was to be considered upon questions involving the conflicting powers of the Federal Government and its members, and a decision rendered which might essentially influence the great operations of the government, and his "deep sense of its importance and of the awful responsibility involved in its decision," and then, after tracing the reasons leading to the adoption of the Constitution and the necessity for its existence, and discussing the subject at some length, at p. 415, said:

"To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt, to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it." * *

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12 Wall., 457

Subject: Construction and Application of Constitution.

In the Legal Tender Cases, 12 Wall., 457, Mr. Justice

Strong, delivering the opinion of the court, pages 532, 533, 534, said:

* * * "We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin* v. *Hunter* it was said: 'The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.' And with singular clearness was it said by Chief Justice Marshall in *McCulloch* v. *The State of Maryland*, 'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.'"

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110 U. S., 421.

Subject: Construction and Application of Constitution.

In *Juilliard* v. *Greenman*, 110 U. S., 421, Mr. Justice Gray, in delivering the opinion of the court, at pages 439–440, said:

"A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the

national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution.

* * * * * * *

"The section which contains the grant of these and other principal legislative powers concludes by declaring that the Congress shall have power

"'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.'

"By the settled construction and the only reasonable interpretation of this clause, the words 'necessary and proper' are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously affect it."

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149 U. S., 698.

Subject: Construction and Application of Constitution.

In *Fong Yue Ting* v. *United States*, 149 U. S., 698, Mr. Justice Gray, at pages 712–713, said:

"As long ago said by Chief Justice Marshall, and since constantly maintained by this court: 'The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'

"'Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.' *McCulloch* v. *Maryland*, 4 Wheat., 316, 421, 423; *Juilliard* v. *Greenman*, 110 U. S., 421, 440, 450; *Ex-parte Yarbrough*, 110 U. S., 651, 658; *In Re Rapier*, 143 U. S., 110, 134; *Logan* v. *United States*, 144 U. S., 263, 283."

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153 U. S., 532.

Subject: Power of Congress.

In *Re Quarles*, 158 U. S., 532, Mr. Justice Gray, at page 535, said:

"The United States are a nation, whose powers of government, legislative, executive and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right created by, arising under or dependent upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the co-relative duty of protection or of the legislative powers conferred upon it by the Constitution, may, in its discretion, deem most eligible and best adapted to attain the object. *United States* v. *Logan*, 144 U. S., 293."

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2. Did Congress have power and authority to enact the statute approved July 24, 1866, if, according to a true construction of the language employed, it gives the appellee the right to construct, maintain and operate its lines over and along the streets and alleys of the city of Richmond, which are post roads.

Construction of the Constitution and its application to Act of July 24th, 1866.

In construing and applying the Constitution to the Act of July 24, 1866, and determining the scope, meaning and intent of the language employed, the foregoing rules and principles must be kept in view, as also the reasoning upon which the Supreme Court has based its conclusions.

The plenary power of Congress over post-roads and its right to enact all laws "necessary," "needful," "requisite," "essential," "conducive to,"—(4 Wheat, 316), their use and usefulness is illustrated by the reference of Chief Justice Marshall to this subject, in *McCulloch* v. *Maryland*, where this eminent jurist, in support of the doctrines there announced, said:

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and a post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence." * *

"Post offices and post roads are established to facilitate the transmission of intelligence," 96 U. S., 1—, and it is not only the right but the duty of Congress to enact broad laws under which intelligence may be rapidly transmitted over and along post roads established by it, and to employ language authorizing the use of improved means and instrumentalities by which the transmission of intelligence may be aided and promoted. The power of Congress over post roads may be exercised within the territorial limits of any State. "This power, like all others vested in Congress, is complete in itself, may be ex-

ercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

The argument of convenience pressed by counsel for the appellant in his brief should be addressed to Congress, not the courts. Congress has placed such restrictions upon the use of post roads, under the provisions of the act of July 24, 1866, as seemed to it proper and necessary, and the wisdom and discretion thus exercised by Congress are not open to review. The great Chief Justice, in *Gibbons* v. *Ogden*, speaking of the power of Congress to regulate commerce, said:

"The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons* v. *Ogden*, 9 Wheat., 1.

The power of Congress over post-roads is found in the same section of the Constitution conferring its power to regulate commerce, and the language quoted from *Gibbons* v. *Ogden* is as applicable to its powers over the former as the latter.

We also submit that the act of July 24, 1866, was enacted by Congress in pursuance of its constitutional power to regulate commerce; that the appellee is engaged in foreign and interstate commerce; that its business is commerce; that it comes within the scope and meaning of that act; and that neither the State of Virginia nor the city of Richmond can deprive it of the rights and privileges conferred by this act of Congress.

In construing this act of Congress we must consider the needs of the country brought about by steam and electricity, the new and improved means and instrumentalities for communication and commerce; the speedy transmission of intelligence; the rapid movement of commodities; the laws of trade and commerce measured and governed by modern thought,

activity and progress; the prosperity and development of the country, and the close and increasing commercial relations of our people, both within and without the States of their residence.

Purpose and Scope of Act of July 24, 1866.

WHY DID CONGRESS ENACT THIS STATUTE?

WHAT ARE ITS PROVISIONS?

WHAT IS ITS SCOPE—ITS TRUE MEANING AND INTENT?

WHAT COMPANIES ARE EMBRACED WITHIN ITS TERMS?

WHAT RIGHTS AND PRIVILEGES DOES IT CONFER?

WHAT RESTRICTIONS AND BURDENS DOES IT IMPOSE?

WHAT PROTECTION WILL BE AFFORDED THOSE ACCEPTING ITS CONDITIONS, AND AGREEING TO SUBMIT TO ITS REQUIREMENTS?

These are some of the questions to be examined and determined.

Why did Congress enact this statute? What purpose had it in view? What did it intend to encourage, aid, assist and promote?

We look first to the title of the act, bearing in mind that the title of an act must be liberally construed, and, like a constitution, is not expected to contain a detail of its sub-divisions and provisions.

The statute in question is entitled, "An Act to Aid in the Construction of Telegraph Lines, and to secure to the Government, the Use of the same for Postal, Military and other Purposes." The title therefore declares that Congress intended to encourage, aid, assist and promote the construction of telegraph lines; and if it intended to aid in such construction, it reasonably follows that it intended to guarantee to those acting under the provisions of the act, the right to maintain and operate these lines after construction. Congress had in view the use of post-roads for commercial intercourse, for business and

social communication, for the transmission of intelligence by means of electricity; it had in view the use of post-roads for the purposes contemplated by the Constitution; it had in view its duty to regulate commerce and establish post-roads according to the meaning and intent of the Constitution; it intended to enact a law "needful," "requisite," "essential," "conducive to,"—commercial intercourse, business and social communication, transmission of intelligence.

The title of the act shows further that Congress contemplated the use of lines constructed, or coming under this act, as a governmental agency for "Postal, Military and other Purposes," the last three words employed in the title being comprehensive enough to embrace all of the purposes for which the Union was formed.

Post Roads.

The title of the act shows also that Congress had postal service prominently in view.

What are the provisions of this act of Congress?

It provides in the first section "that any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads, * * " it being of course understood that the act contains other provisions which need not at this point be mentioned, and that it applies only to companies accepting its conditions.

The language of the act is broad and comprehensive. It would have taxed the learning and ability of a Marshall to find words more apt and sweeping. The act omits notice of

State lines. It undertakes to execute the constitutional power of Congress, without reference to territorial limits. A telegraph company under the provisions of the act may construct, maintain and operate lines of telegraph upon post-roads, wholly within a single State, or partly in one State and partly in another, or in and through several States. This is the natural and reasonable meaning of the language employed.

It was as much the duty of Congress to enact laws for the use of post roads within the limits of a State, as to enact laws for their use where such post roads extended through several States or parts of several States. It is fair to assume that Congress intended to discharge its whole duty. The language employed bears out this contention. The words used are apt words to convey this meaning. The statute provides "that any telegraph company * * shall have the right to construct, maintain and operate lines of telegraph * * over and along any of the military or * * post roads of the United States which have been or may hereafter be declared such by act of Congress. * * *." Mark the language "over and along any of the military or post roads of the United States." This gives a telegraph company the right to select any particular post road. The post roads to be selected are not limited in number or place. One company may run its lines within a single city or county; another through several counties of a single State; another may construct its line through half of the counties of a single State; another partly in one State and partly in another State; another throughout several States; and yet another may construct, maintain and operate its lines through all the States of the Union. The purpose of the act was "to aid in the construction of telegraph lines"—not to aid in the construction of telegraph lines wholly for the purpose of interstate and foreign commerce. It was "to aid in the construction of telegraph lines" for all of the purposes for which Congress has constitutional power "to establish Post Offices and Post Roads."

"There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be

given their natural and ordinary signification." *Pensacola Telgh. Co.* v. *W. U. Telgh. Co.*, 96 U. S., 12.

The fact that the statute gives any telegraph company, coming under its provisions, "the right to construct, maintain and operate lines of telegraph," over and along post roads of the United States, "which have been, or may hereafter be, declared such by act of Congress," is significant. It shows that Congress intended to confer broad privileges in the selection of routes.

The right to construct lines was not confined to post-roads established by Congress prior to July 24, 1866; it conferred also the right to construct lines upon any post-road established by Congress after the passage of the act. What language could have been more apt? What words more comprehensive? The language, "any of the military or post-roads of the United States which have been, or may hereafter be, declared such by act of Congress," covers every post-road then in existence, and every post-road thereafter established, which any telegraph company, then organized or thereafter organized under the laws of any State of this Union, might see fit to use. The act encouraged the construction of telegraph lines in the broadest sense. It not only conferred the rights and privileges specified in the act, upon companies then in existence, but it invited the formation of new companies. The reasonable and natural construction of the language employed, indicates that it intended to encourage the organization of small companies as well as large; that it intended to meet the needs of every locality, every section, every State; to meet the needs of the people for communication and the transmission of intelligence at home as well as abroad; to meet the needs of the citizen within his own State as well as beyond its limits.

The language employed also indicates that Congress intended the act to meet the needs of the general government, both within and beyond the limits of any particular State. The second section of the act is as follows:

"Sec. 2. And be it further enacted that telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

This language includes "telegraphic communications between the several departments of the Government of the United States and their officers and agents," wherever the lines of any particular company may extend, whether within the limits of a single State or within the limits of several States. It requires that such telegraphic communications, "in their transmission over the lines of any of said companies (shall) have priority over all other business." The purpose of the act in this regard was to keep the several departments of the government in close touch with each other; to establish instantaneous communication between the several departments of the government and their officers and agents, wherever the departments and their officers and agents may be located. Why should the act have withheld from the government the power of instantaneous communication with its officers and agents in the city of New York, for example? Why should it have denied to the several departments of the government facilities of communication within the limits of a large city, where several departments are located within its limits?

"The Constitution of the United States and the laws made in pursuance thereof, are the supreme law of the land. Art. VI, par. 2. A law of Congress made in pursuance of the Constitution, suspends or overrides all State statutes with which it is in conflict." *Pensacola Telegraph Co.* v. *W. U. Tel. Co.*, 96 U. S., 1. The wisdom and the discretion of Congress are the sole restraints on which the people can rely to secure them from the abuse of power conferred by the Constitution. "They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons* v. *Ogden*, 9 Wheat., 1.

Upon looking to the Constitution, we find the power of

Congress, "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and "to establish Post Offices and Post Roads," alongside of its power to exercise functions without which the government could not exist; to exercise the most vital functions of existence. We find in the same section, for example, the power of Congress, to lay and collect Taxes, Duties, Imposts, to pay Debts, and provide for the common defence and general welfare of the United States: to borrow Money on the credit of the United States: to coin money, and regulate the value thereof: to constitute Tribunals inferior to the Supreme Court: to declare War, grant letters of marque and reprisal: to raise and support armies: to provide and maintain a navy, and other powers of scarcely less importance.

Who would question the power of Congress to enact statutes on the subjects listed above? To deny such powers to Congress, would destroy the Union.

The second section of the act not only requires that communications between the several departments of the government and their officers and agents shall have priority in their transmission, but provides that such messages "shall be sent at rates to be annually fixed by the Postmaster-General." Here we have an important privilege reserved by the government, and a burden imposed upon telegraph companies accepting the provisions of the act. Observe in this connection that the Postmaster-General is the officer of the National Government charged with the duty of annually fixing rates under this statute.

The third section of the act provides "that the United States may, at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the

United States, two by the company interested, and one by the four so previously selected." This provision seems to go far towards demonstrating our contention that the act of July 24, 1866, intended to encourage the formation of telegraph companies for that purpose, and to aid and assist in the construction of lines in every part of the Union, without reference to length of lines and whether such companies confined their lines to a single city or State, or extended them through several States. It indicates that Congress had in view the purchase of such lines for use as a part of the postal system of the United States.

The third section of the act is far-reaching in its provisions, and shows that Congress had clearly before it the importance of placing the National Government in a position to use electricity as a part of its postal system. This subject might be elaborated almost indefinitely. The title of the act, declaring that it is "an act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military or other purposes," when read in connection with the provisions of its third section, providing how such telegraph lines may be taken by the government at an appraised value, speaks with all the emphasis of volumes of argument.

The fourth section of the act is as follows: "And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this Act."

Here we have again a reference to the Postmaster-General, and a declaration, in substance, by Congress, that the act in question belongs to that class of subjects coming under the jurisdiction of the Postmaster-General.

Postal Service.

Congress, in the exercise of its constitutional power, has enacted statutes establishing a comprehensive and far-reaching system of postal service.

It has availed itself of new and useful means and instrumentalities to promote this branch of the public service. Under its laws every citizen can have rapid transmission of intelligence, safe carriage of papers, and cheap transportation of light merchandise. The government has also provided a banking department as a part of its postal system, at all important offices, for transferring money from one office to another. It has postoffices not only in cities, but in every village or hamlet throughout the land. The service varies according to the needs of the locality. A service covering every requirement of a rural district would be insufficient to meet the necessities of a commercial city. Means and instrumentalities are used in cities which are not employed in the country.

By reference to sec. 3964 of U. S. Revised Statutes, it will be seen that

"The following are established post roads * * * *: All letter carrier routes established in any city or town for the collection and delivery of mail matters."

So also by the act of March 1, 1884, 23 Stat., 3:

"All public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

Power to establish post roads carries with the grant power to use post roads, when established, for postal purposes, and this power includes authority to determine what means and instrumentalities shall be employed to facilitate the transmission of intelligence and to regulate these means and instrumentalities in such manner as Congress, in the exercise of its plenary power, may deem likely to promote the efficiency of the service.

Congress has not only responded to its duty of establishing

post roads in cities, but has undertaken the additional duty of collecting and delivering mail matter. Much is expressed by the words—"All letter carrier routes established in any city or town for the collection and delivery of mail matters." Under this and other statutes, letter carriers are appointed and paid by the National Government, who collect and deliver mail matter along the streets of every important city in the Union; who collect and deliver mail at every door. Here we have means and instrumentalities not in use when the Constitution was adopted. Here we have an illustration of the intention of Congress to provide for the transmission of intelligence from door to door along post roads, making no distinction between commercial, professional and social communications. Postal service moves along broad lines.

The telephone had not come into use when the statute of July 24, 1866, was enacted, but the same far-reaching policy which brought this law into existence embraced all improvement and development in the art of communicating intelligence by means of electricity; and the framers of the law employed language which, we submit, clearly included telephone companies, and permitted such companies to avail themselves of the rights, privileges and protection afforded by its provisions.

As hereinbefore stated, this act does not apply to telegraph companies with lines extending into or through two or more States, as contradistinguished from companies whose lines are wholly within the limits of a single State. It applies to telegraph companies, without regard to territorial limits.

The exercise of authority in this form was not accidental. Congress is not hampered in the enactment of laws regulating the postal service. It has power to enact general or special laws. It may have a different postal service in each city. It cannot be presumed that this discretion will be abused. The act in question illustrates its prudence and caution in requiring that every telegraph company availing itself of its provisions shall so construct, maintain and operate its lines as not to interfere with ordinary travel upon post-roads.

The telephone has become as indispensable in cities for local communication as the telegraph for communication between distant points. A city without a telephone, at this day, would be classed with a city having no railroad. The one has become as indispensable as the other. The telephone brings the merchant, the banker, the professional man in touch with the community in which he lives. Prices are quoted over the 'phone, orders are given, contracts made, and business in its various ramifications transacted. The telephone has become a necessity to active, energetic men engaged in any calling or profession in a city, and especially to those who most freely used the postal service for communication and the conduct of business, before the telephone came into general use. It cannot be doubted that the telephone is constantly used as a means of communication where letters were employed before its introduction. It cannot be successfully questioned that it is daily growing in use and usefulness and that business upon the telephone keeps pace with the development and extension of the system. It cannot be fairly denied that it materially aids, assists and relieves the postal service conducted by the government through its post-offices and letter carriers. It serves the purpose which the policy of the government intended to promote when it enacted the statute of July 24, 1866. The telephone is a new and useful means and instrumentality for communication and the transmission of intelligence. It brings the powerful agency of electricity to the door of the citizen, and enables him to instantaneously transmit and receive intelligence, to make contracts which, under old methods, would have necessitated written communications passing through the post-office, and days of delay to accomplish what may now be completed as rapidly as if the parties contracting stood face to face.

These views find support in *Pierce* v. *Drew*, 136 Mass., 75, and *Julia Bldg. Association* v. *Bell Telephone Co.*, 88 Missouri, 258, and other well considered cases. In the latter case the court, at pp. 268, 269, said:

"If a citizen living or doing business on one end of Sixth

street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman or carriage."

The language of the act of July 24th, 1866, the policy of the law, and the purpose of aiding, assisting and promoting the postal service and securing telegraph lines, for the use of the Government and its citizens alike, include and embrace the telephone, and we confidently submit that the complainant is upon the streets of the city of Richmond with its poles and wires under the paramount authority of this act of Congress. It is a governmental agency, performing important functions. It has complied with the requirements of the above act, by filing an acceptance of its provisions with the Postmaster General. It must accept from the Government, for service rendered, such compensation as may be fixed by the Postmaster General in his annual schedule of rates. It must sell its lines to the Government when the latter may wish to become the

sole owner of the same. The appellee, therefore, expects, and has a right to expect, protection from the National Government in the conduct of its important functions upon post routes in the city of Richmond, and protection from destruction of its property by the city.

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96 U. S., 1.

Subject: Postal Service—Commerce.

This statute was first construed in the case of *Pensacola Telegraph Co.* v. *West. Union Telegraph Co.*, 96 U. S., 1. Chief Justice Waite, delivering the opinion of the United States Supreme Court, said:

"Congress has power 'To regulate Commerce with foreign Nations and among the several States.' (Const., Art. I, sec. 8, par. 3); and 'to establish post offices and post roads,' (Const., Art. I, sec. 8, par. 7). The Constitution of the United States, and the laws made in pursuance thereof, are the supreme law of the land. Art. VI, par. 2. A law of Congress made in pursuance of the Constitution, suspends or overrides all state statutes with which it is in conflict.

"Since the case of *Gibbons* v. *Ogden*, 9 Wheat., 1, it has never been doubted that commercial intercourse is an element of commerce, which comes within the regulating power of Congress. Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing

vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances As they were entrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States, and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation.

"The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates, show that more than eighty per cent. of all the messages sent by telegraph, related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

"It is not only important to the people, but to the Government. By means of it, the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by enquiry, what is transpiring anywhere that affects the interests they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile State legislation. * *"

125 U. S., 530.

Subject: Post-Roads—Commerce.

In *West. Union Telegraph Co.* v. *Massachusetts*, 125 U. S., 530, this statute was further construed by the same court. In that case the Commonwealth of Massachusetts sought to enforce the collection of a tax upon the property of the Western Union Telegraph Company, levied under her statutes, and to enjoin the company from further operation of its lines within its territorial limits of the State, until this tax was paid. The telegraph company claimed exemption from taxation on a large part of its line, located over, under or across post-roads, made such by the United States. An injunction was awarded by the lower court, which was dissolved by the appellate tribunal. In delivering the opinion of the court, Mr. Justice Miller said:

"The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States. * * * and over, under, or across the navigable streams or waters of the United States,' is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal Government, carries with it any exemption from the ordinary burdens of taxation.

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, *or stop the use of them after they were placed there*, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is

liable to be taxed upon its real or personal property as any other person would be. * * *

"The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions 'shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States.' It is found in this case that 2,334.55 miles of the company's lines, out of 2,833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done."

Interstate Commerce.

Coming next to a consideration of the rights of the complainant as an instrument of interstate and foreign commerce, and the protection afforded it, as such, under the constitutional and statutory provisions above recited, we invite the attention of the court to the following paragraphs of the complainant's bill, to be found at pages 2 and 3 of the printed record, which are as follows, viz:

"That in the conduct of its business as aforesaid, your orator maintains in the city of Richmond an office or exchange, supplies and instruments connected by wires with a large num- of subscribers and *with the office of the Western Union Telegraph Company in said city*, and that your orator has now in the said city of Richmond a large number of such *subscribers, each and all of whom* may be and many of whom *are connected through said exchange with the office of said Western Union Telegraph Com-*

pany, and may, and many of such subscribers do, transmit through the instruments on their said premises, through said Exchange and to the office of the Western Union Telegraph Company, messages addressed and intended to be sent and which are sent to points in other States, in the District of Columbia, and foreign countries; your said orator having for years received and transmitted such messages in this manner *under agreement still in force;* and it also has subscribers outside of the city of Richmond, whose 'phones connect with the other 'phones of your orator in said city, by and through means of wires and poles of your orator located on and along the streets and alleys of the said city, many of which customers have no ready and convenient access to said Telegraph Company, except through the use of your orator's wires and poles *for the transmission and receipt of telegrams between them and points outside the State of Virginia and use said 'phones, wires and poles of your orator in connection with said Western Union Telegraph Company for that purpose, under and by virtue of an agreement between your orator and said Western Union Telegraph Company for the joint use of the poles and fixtures of said companies in sending and receiving such messages;* and that part of such transmission from the office of your orator's subscribers to and from the office of the Western Union Telegraph Company, of messages addressed and sent by telegraph to and from points outside of the State of Virginia, to the District of Columbia and to foreign countries, is interstate commerce and is commerce between said points outside of the city of Richmond and the city of Richmond and other States and the District of Columbia and foreign countries, and is a necessary part of the business of your orator, and that its said wires in the city of Richmond, and its poles to which they are attached are used for that purpose, and that therefore your orator's business in the city of Richmond is not confined to telephonic messages between different points in said States and in the State of Virginia, and it is the intention and purpose of your orator to continue in the future, as it has in the past, from time to time to extend its business and build its lines still more across and

beyond the city of Richmond and State of Virginia into other countries and States."

The statement of Mr. Tree, on page 85 of the record, sustains this statement as to the manner of conducting their business, and is as follows:

"There is in the office of the Western Union Telegraph Company in Richmond, Va., three sets of 'phones, received from the American Bell Telephone Company, which are now and have been for many years used for receiving and delivering messages from and to subscribers of the Southern Bell Telephone and Telegraph Company, which are sent to and received from points in and out of the State of Virginia and in foreign countries over the wires of the Western Union Telegraph Company and cables between the U. S. and Europe. These 'phones in the Western Union office in Richmond connect with all the 'phones of the Southern Bell Telephone and Telegraph Company used in and connected with its exchange in Richmond, and are operated as follows, to-wit:

"A subscriber of the Southern Bell Telephone and Telegrarh Company who wishes to send a telegram over the Western Union Lines calls up the Western Union office in Richmond through his 'phone; the clerk of the Western Union Telegraph Company at the 'phone in its office receives the message through the 'phone, puts it in writing and hands it to the operator of the Western Union Telegraph Company, who transmits it over the wires of the latter Co. to its destination.

"When a telegram is received from a point outside of Richmond over the wires of the Western Union Telegraph Company to be sent to a subscriber of the Southern Bell Telephone and Telegraph Company, the Western Union Telegraph operator who receives the message puts it in writing and hands it to the 'phone clerk of the latter company, who has charge of one of the 'phones in its office in Richmond, who calls up the person to whom the message is addressed over the 'phone and delivers it to them through the 'phone. Telegrams are thus

delivered to a large number of subscribers of the Southern Bell Telephone and Telegraph Co., located in and outside of the city of Richmond, Va., but only to those subscribers who request delivery of telegrams by telephone. The 'phone clerk in the Western Union office goes on duty at 9 A. M. daily and attends to these 'phones continuously until 6 P. M. At that time until 2 A. M. the said 'phones in the Western Union office are operated by the regular receiving clerk of the Western Union Telegraph Company on the first floor of the office.

"Over 50% of the telegrams thus sent and received through these 'phones are messages to and from points outside of the State of Virginia. A number of telegrams are sent through these 'phones from pay stations of the Southern Bell Telephone and Telegraph Co., in and outside of Richmond, connected with the Richmond Exchange, by persons who are not subscribers of the Southern Bell Telephone and Telegraph Company.

"(Signed) J. B. TREE, *Supt.*

"*Richmond, Va., June 30, '97.*"

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105 U. S., 460.

Subject: Interstate Commerce.

In *West. Union Tel. Co.* v. *Texas*, 105 U. S., 460, Chief Justice Waite, in delivering the opinion of the court, said:

"In *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., 1, this court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to

those engaged to any considerable extent in commercial pursuits."

EVERY LINK IN A LINE EMPLOYED FOR THE PURPOSE OF TRANSMITTING INTELLIGENCE, OR TRANSPORTING PASSENGERS AND FREIGHT, BETWEEN THE SEVERAL STATES OF THE UNION, IS PROTECTED BY ARTICLE I, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES, AND IS UNDER THE REGULATING POWER OF CONGRESS.

The authorities on this point are numerous and emphatic, but, in view of the extended citations already given, a few only will be noticed under this head, and that as briefly as possible.

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22 Howard, 244

Subject: Interstate Commerce.

In the case of *Foster* v. *Davenport*, 22 Howard, 244, a steamboat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile and the wharves of the city, and in towing vessels anchored there to and from the city, and in some instances, towing the same beyond the outer bar of the bay into the gulf to the distance of several miles, and the Supreme Court of the United States held that the character of the navigation and business in which this steamboat was employed, could not be distinguished from that of the vessels it towed or unloaded.

Mr. Justice Nelson, in delivering the opinion of the court, said:

"It is quite apparent, from the facts admittted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coast-wise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot

be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination." * *

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10 Wall, 557.

Subject: Interstate Commerce.

The Daniel Ball, 10 Wall., 557, is also an authority. In that case, the steamer Daniel Ball, was engaged in navigating Grand river, in the State of Michigan, between the cities of Grand Rapids and Grand Haven, and in the transportation of merchandise and passengers between these places, without having been inspected or licensed under the laws of the United States; and, to recover the penalty provided for want of such inspection and license, a libel was filed. It was admitted by stipulation of the parties, that some of the goods she shipped at Grand Rapids and carried to Grand Haven, were destined and marked for places in other States than Michigan, and that some of the goods she shipped at Grand Haven came from other States, and were destined for places within the State of Michigan; and it was also admitted that this steamer did not run in connection with or in continuation of any line of steamers or vessels on Lake Michigan, or any line of railway in the State, although there were various lines of steamers and other vessels running from places in other States to Grand Haven carrying merchandise, and a line of railway was running from Detroit which touched at both the cities named.

The owners of the steamer set up as a defence that the Grand river is not a navigable water of the United States, and that *the steamer was engaged solely in domestic trade and commerce, and was not engaged in commerce between two or more States*, or in any trade by reason of which she was subject to the navigation laws of the United States, or was required to be inspected and licensed.

The District Court dismissed the libel. The Circuit Court reversed this decision, and gave a decree for the penalty de-

manded, and, on appeal to the Supreme Court of the United States, the decree of the Circuit Court was affirmed.

In delivering the opinion of the court, Mr. Justice Field said:

* * * "So far as she was employed in transporting goods destined from other States, or goods brought from without the limits of Michigan, and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress." (See also *Railway* v. *Illinois*, 118 U. S., 557, and cases cited.)

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92 U. S., 259.

Subject: Interstate Commerce.

In the case of *Henderson* v. *Mayor of New York*, 92 U. S., 259, 275, Mr. Justice Miller, in delivering the opinion of the court, said:

"The transportation of a passenger from Liverpool to the City of New York is one voyage. It is not completed until the passenger is disembarked at the pier in the latter city. A law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."

118 U. S., 572.

Subject: Interstate Commerce.

The language of Mr. Justice Miller, in *Wabash Railway* v. *Illinois*, 118 U. S., 572, is strikingly apposite. In that case this eminent jurist said:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. (*Cook* v. *Pennsylvania*, 97 U. S., 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446.) And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

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136 U. S., 104.

Subject: Interstate Commerce.

The extent to which the regulating power of Congress has been carried is even more strikingly illustrated in *McCall* v. *California*, 136 U. S., 104–111. In that case the court held that an agency of a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line at Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, was

an agency engaged in interstate commerce, and that a license tax imposed upon the agent for the privilege of doing business in San Francisco was a tax upon interstate commerce, and therefore unconstitutional.

Mr. Justice Lamar, in reversing the judgment of the Superior Court of San Francisco, at p. 111, said:

"It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is, that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defence, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is—was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

And this learned judge, on page 108, quotes from Pomeroy as follows:

"Pomeroy, in his work on 'Constitutional Law,' section 378, referring to the signification of the word 'commerce,' says: 'It includes the fact of intercourse and of traffic and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-

matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may, therefore, be regulated.'"

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136 U. S., 118.

Subject: Interstate Commerce.

The exclusive power of Congress over this subject is aptly illustrated in *Railway Co. v. Penn.*, 136 U. S., 118. In that case Mr. Justice Lamar said:

"The question before us is thus narrowed to the two following inquiries: (1) Was the business of this company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employees, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meagre on this question—much more so, indeed, than the undisputed evidence in the case warranted—enough is stated in the second paragraph of the aforesaid finding to show that the company is engaged in interstate commerce in the State. It is there said in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk and Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is Interstate Commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line is engaged in interstate commerce, since the business of each one of those roads

serves to increase the volume of business done by that through line."

The proof in this case, it is respectfully submitted, brings the case at bar clearly and fully within the principles announced in each of the foregoing opinions. The case of *Railroad Co.* v. *Penna.*, 136 U. S., 118, had a traffic feature strikingly like the agreement between the Western Union Telegraph Company, the American Bell Company, and the appellee, herein before referred to. Independently of this agreement, which has existed for years and is still in force, and under which the appellee and the Western Union Telegraph Company receive and transmit telephone communications from and to other States, the District of Columbia and foreign nations, the case at bar seems to be plainly and absolutely covered by the foregoing decisions; but, with that agreement in force, it is, we think, impossible to escape the conclusion that the appellee's business comes within the regulating power of Congress, and that it cannot lawfully be disturbed in the discharge of its functions by the city of Richmond, or be driven from the streets of the city, or have its property substantially destroyed, as set out in the bill.

If it is impossible to distinguish between the business of a lighter engaged in towing, loading and unloading vessels, from the business of the vessel it towed or unloaded—is it not equally impossible to distinguish between that part of the transmission of a telegraphic dispatch from the city of New York, for example, passing over the lines of the Western Union Telegraph Co. to Richmond, and that part of its transmission passing over the lines of the appellee in the city of Richmond, before it finally reaches and is received, through his own telephone on his own premises, by appellee's subscriber to whom it is addressed in said city of Richmond? If towing, loading and unloading a vessel in Mobile Bay was but a prolongation of the voyage of the vessel assisted, is not that part of the transmission of the New York message which is communicated by means of electricity from the office of the Western Union Telegraph Com-

pany to appellee's subscriber, on his own premises, also a prolongation of the voyage of the telegram—*especially since both of these companies are public servants engaged in the transmission of intelligence which is an indispensable and increasingly important part of Interstate Commerce?* The line of reasoning which leads to the protection of the lighter necessarily brings the means and instrumentalities of appellee upon the streets of Richmond, for the transmission of intelligence, under the regulating power of Congress.

In the case of "The Daniel Ball," cited above, the steamer ran wholly within the State of Michigan and was not run in connection with or in continuation of any other line leading to or from other States; and yet the court held that it was engaged in Interstate Commerce, so far as it carried goods, having either their point of shipment or destination in other States. If the transportation of goods under these circumstances comes within the regulating power of Congress, it seems to be plain that the transmission of Foreign or Interstate telegrams over the lines of appellee in the city of Richmond, to and from its subscribers, as set out in its bill, comes within the same regulating power. That part of the transmission of a Foreign or Interstate message passing over the lines of the appellee, is as much a part of the voyage of the telegram as that part of its transmission passing over the lines of the telegraph company. The fact that several different agencies are employed in its transmission in no respect affects the character of the transmission. To the extent in which each means and instrumentality acts, in that transmission, it is subject to the regulating power of Congress, under the interstate commerce clause.

The language of Mr. Justice Field, in the Daniel Ball, 10 Wall., is especially apposite, when the case at bar is considered, without the agreement between the West. Union Telegraph Co. and the appellee. On page 565, this great Judge said :

* * "So far as she was employed in transporting goods destined for other States, or goods brought from with-

out the limits of Michigan and destined to places within that State, she was engaged in Commerce between the States, and however limited that Commerce may have been, she was, so far as it went, subject to the legisiation of Congress. * *

* * The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

And the language of Mr. Justice Lamar in *Railroad Co.* v. *Penna.*, 136 U. S., 114, is even more strikingly apposite, when the case at bar is considered with reference to the agreement for years existing and still in force between the West. Union Telegraph Co., and the appellee, and the American Bell Co., by and under which agreement the same messages are received and transmitted over the lines of two public servants, viz: the appellee and the West. Union Telegraph Co., organized for and engaged in the business of transmitting and receiving messages by means of electricity, and operating in connection with each other.

We repeat a second time a part of the opinion of the court quoted above. Mr. Justice Lamar, at page 119, said:

* * * "It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads, the Norfolk and Western Railroad Company 'has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.' That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part, or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is interstate commerce. That being true, it logically follows that any

one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, s[illegible]e the business of each one of those roads serves to increase th[illegible] volume of business done by that through line."

THE DELIVERY OF A MESSAGE IS INCIDENT TO ITS TRANSMISSION. THE ACT OF INTERSTATE COMMERCE IS NOT COMPLETED UNTIL THE DELIVERY OF THE MESSAGE; AND ALL MEANS AND INSTRUMENTALITIES EMPLOYED FOR ITS DELIVERY ARE SUBJECT TO THE REGULATING POWER OF CONGRESS.

The power of Congress to regulate commerce when applied to telegraphic communications, necessarily includes the power to regulate the receipt and delivery of messages.

All means and instrumentalities employed for the collection and delivery of interstate messages, are engaged in and are parts of interstate commerce. The act of interstate commerce is not completed until the message has finally reached its destination. The delivery is a necessary instrumentality employed by the company to perform the required service. The appellant has no greater power to regulate the receipt and delivery of such messages than it has to regulate their transmission over the wires when they reach the territorial limits of the State. If appellant has power to regulate the one, it has power to regulate the other.

The transmission of such messages over the wires would be useless without delivery, and their delivery would be impossible without transmission. The two together constitute the means of intercommunication; the two together are inseparable parts of the same act; the two together constitute the act of interstate commerce. The delivery is the very life of the message. Then only has intercommunication become accomplished. Then, and then only, has the act of interstate commerce been completed. Then, and then only, has the protecting power of Congress ceased.

The delivery of messages is paid for by the company, and

was not only designed to assist and increase the business of the company, but we may go further and say that it has come to be an absolute necessity in order to meet the demands of the public; and it is obvious that all obstructions of this service, are direct burdens upon that free and untrammelled intercourse between the States, which the Supreme Court has so often declared to exist where Congress has taken no action on the subject.

If the railroad agent in San Francisco, soliciting passengers to take his employer's line at Chicago for New York, was an agency engaged in interstate commerce, and subject to the regulating power of Congress, because, as the court said, "it assisted, or was carried on with the purpose to assist, in increasing the amount of passenger traffic on the road," can any reasonable mind question the correctness of the assertion that an agency employed for the collection and delivery of messages is also engaged in such commerce?

Could it be successfully contended that the messenger boy who carries the telegram from the office of the Western Union to its destination in Richmond is beyond the protection afforded by the interstate feature of the Constitution of the United States? We submit that Congress has full power to protect him from being prohibited or obstructed, by the State or city, from performing this very essential duty of delivering messages received over the wires of the telegraph company. If such an effort should ever be made by the city, we respectfully submit that the City Attorney would find the Congress and United States Courts had full power to protect him, and that in doing so the case of *McCall* v. *California*, 136 U. S., would be an authority in point; and applying the test there applied, and substituting the messenger boy here in the place of the agent in California, who solicited passengers of the railroad in that case, the court here would say—as the court there said—the test is: Was the business (of the messenger boy) a part of the business of the company? Did it assist, or was it carried on with the purpose to assist, the business of the company?—if so, then it was within the protection of the Constitution of the United States.

We submit that the decision in *McCall* v. *California*, answers fully these questions.

The case at bar is much stronger in our favor than the one just put of the messenger boy. The telephone transmits the message coming or going over the Western & Union line by electricity, instantly by electricity—just exactly, we insist, in the same way a message sent all the way by the Western Union line, from a point on the line in the country near Richmond to a point beyond Richmond, which had to go through the Richmond office, would be sent. Such a message would have to be transferred in the same way, at the Richmond office—from the wire coming into the office, to a wire going out of the office—in which a telephone message is transferred from the telephone wire to the telegraph wire in the Western Union office in Richmond; but, whether it is done in exactly the same way or not, the important fact that it is transferred from one wire to another in the same office, and then sent on its way to instantaneous delivery by electricity—the same motive power which brought it—is the one vital, connecting and similar fact which would render it impossible to draw a sound distinction between the two cases. If the transfer of a telegram in the Western Union office in Richmond, passing between points inside and outside of the State of Virginia, for the purpose of sending it to, or receiving it from points on its own lines, connecting in its Richmond office with its wires running out of the State, is interstate commerce—and surely this will not be denied—how can the transfer of a similar message in the Western Union office to and from telephone wires entering in the same office of the telegraph company, be held not to be interstate commerce? The transfer of freight, &c., in the case of *Foster* v. *Davenport*, 22 Howard, and in *The Daniel Ball* case, in 10 Wall., and other cases cited in this note, was much more a break in the transmission of the goods, occupied more time and gave more trouble in making the transfer, from one vessel to another, than occurs in this case.

Great reliance is placed by appellant's counsel upon *Coe* v. *Errol*, 116 U. S., 517; a case involving questions of taxation,

which went by writ of error from the Supreme Court of New Hampshire to the Supreme Court of the United States. The extract in appellant's brief, pp. 41-42, taken from a paragraph on page 528 of the report, must be read in the light of the facts, the subject under consideration, and the entire opinion.

The questions under consideration in *Coe* v. *Errol*, were precisely as follows, to-wit:

1. Whether the products of a State, though intended for export to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, are liable to be taxed like other property within the State?

2. Whether the owner's state of mind in relation to the goods, that is, his intention to export them, and his partial preparation to do so, exempt them from taxation.

In the very paragraph from which the City Attorney makes his extract, we find the following clause:

"It seems to us untenable, to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State."

This language immediately precedes the quotation made by appellant's counsel, and, in our view, so explains and limits that quotation as clearly to show its inapplicability to the case at bar. The learned justice who delivered the opinion was indicating when a State may tax property, and showing that the partial preparation and gathering together of products for future export does not, and on principle cannot, exempt such property from taxation by the State in which the point selected as a place of deposit is located. He points out that such products may never be exported; that the owner may change his mind; that, up to this point, the exportation is a matter alto-

gether *in fieri* and not at all a fixed and certain thing. This is the line of thought in which Mr. Justice Bradley said:

"The carrying of them in carts or other vehicles or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for exportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State."

This is a part of the extract contained in the brief of appellant's counsel, upon which he so greatly relies.

How does it affect our case? What possible application can it have to a telephone message—from New York, for example—to one of the appellee's subscribers in the city of Richmond, whose messages are transmitted over Western Union wires to the office of that company in this city, and thence over appellee's wires to the addressee, who receives the message through the 'phone in his own place of business? To ask the question is to answer it.

Or, take a message from a subscriber of the appellee in Richmond to a merchant in New York, transmitted partly by 'phone and partly by Western Union wires. When such subscriber speaks his message into the 'phone, it is, in the very language of Mr. Justice Bradley, "actually launched on its way to another State." Its departure for another State is not properly a matter *in fieri*. When such message leaves the lips of appellee's subscriber, it actually begins a continuous journey to its destination, and the regulating power of Congress goes with it from the beginning to the end of the journey.

It is true that *Coe* v. *Errol* was cited in *Kidd* v. *Pearson*, 128 U. S., 1, and in *Lehigh Valley Rd.* v. *Penna.*, 145 U. S., 192; but not for the purpose of overruling, in even the slightest degree, the doctrine so clearly announced in *Foster* v. *Davenport*, 22 How., 244; *Henderson* v. *Mayor of New York*, 92 U. S.,

259–275; *Wabash Ry.* v. *Illinois*, 118 U. S., 572–3; *The Daniel Ball*, 10 Wall., 557; *McCall* v. *California*, 136 U. S., 104; *Ry. Co.* v. *Penna*, 136 U. S., 118, *et seq.*, and other like cases. *Kidd* v. *Pearson and Lehigh Valley Rd.* v. *Penna.*, are so widely differentiated from our case as to render extended comment upon them unnecessary.

In short, there is a wide distinction, not only in circumstance, but in principle, between the case at bar, on the one hand—and *Coe* v. *Errol* and the cases following it, on the other. The Errol logs, the Kidd & Pearson whiskey, had a primal original, and antecedent existence, as part of the property of the State from which they were ultimately exported, and as such, were undoubtedly subject to taxation, or to police supervision and control, by such State; and the question in all this class of cases was, whether or not this primal, original and antecedent existence and character had as yet terminated, and a new character and existence, as subjects of Interstate Commerce and of Congressional control and regulation, had as yet begun. In the case at bar, on the contrary, the moment the message from New York is uttered into the 'phone at Richmond, it is unmistakably and indelibly stamped and branded as a subject of Interstate Commerce and of Congressional control.

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3. Does the Act of Congress of July 24, 1866, embrace within its scope Telephone Companies—i. e., the Appellee in the case at bar?

On page 26 of their brief, counsel for appellant say:

"1st. We recognize the constitutionality of the above mentioned act of Congress. (*Pen. Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S., 1; *Telegraph Co.* v. *Texas*, 105 U. S., 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S., 530; *St. Louis* v *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)

"2d. We recognize, as declared by act of Congress, that all streets which are letter-carrier routes are post-roads. (*St. Louis* v. *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)

"3d. We recognize that under said act of Congress a telegraph company can obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality. (*St. Louis* v. *West. Union Tel. Co.*, 148 U. S., 92, and 149 U. S., 465.)"

What is left of appellant's case and contentions after these concessions?

Appellee was organized under the laws of the State of New York and has accepted the act of Congress of July 24th, 1866. The courts, English and American, unanimously hold that telephone companies are telegraph companies, and that telephone lines stand upon the same footing with telegraph lines. Appellant admits the constitutionality of the act of July 24, 1866, that the streets of Richmond city are post-roads, and that "a telegraph company may obtain a right of way for its poles and wires through a city and along its streets against the wish of the municipality."

We submit that the Act of July 24th, 1866, is sufficiently broad to protect the rights of the appellee and that said act was intended to protect rights of this character. The language of the act is not limited to companies doing an interstate commerce business, but applies to all telegraph companies and embraces all "post roads." Under the express terms of this act the appellee had a right to construct, maintain and operate its lines on the post roads (streets and alleys) of the city of Richmond. No distinction is attempted to be made between telegraph companies doing an interstate and those doing a local business. Unless, however, the Constitution of the United States contained some warrant for its enactment, this act would, of course, be null and void. Accordingly it was attacked and its validity, in the very first case which came before this court, was put clearly on two grounds, to-wit: that Congress had power to pass it, under both the interstate commerce provisions and the provision in the constitution which empowers Congress "to establish post offices and post roads." See *Pensacola Tel. Co.* v. *W. U. Tel. Co.*, 96 U. S., Page 1. It is clear

that the act of 1866 did not need both of these constitutional provisions to support it, but that either would have done so. Had it, however, rested entirely on the interstate commerce provision of the constitution, its language would, perhaps, have been too broad, in so far as it embraced, as it clearly does, all telegraph companies, as well as those doing local as those doing interstate business.

We do not know whether counsel for the city intend to claim that this act is unconstitutional in part, *i. e.*, as to so much of it as applies to local telegraph companies. If not, then they must admit that it rests (as we insist it does, and as was said in the case just cited) on the constitutional provision allowing Congress to establish post offices and post roads, and clearly protects a telegraph company doing merely a local business. If they claim that it is unconstitutional in part, we submit that they cannot escape the point made in our brief, that the appeal in this case by the city was improperly taken to the Circuit Court of Appeals—they having drawn in question the constitutionality of the Act of Congress of July 24, 1866.

Counsel for appellant on page 47 of their brief, in discussing the Act of Congress of July 24, 1866, say:

Extract from Brief of Appellant.

"No case decided by the Supreme Court puts the constitutionality of the act upon the ground that the telegraph forms a part of the postal service. Every decision of that court, construing said act of Congress, finds the power of Congress to enact such a statute in the clause of the Constitution of the United States as to interstate commerce."

In reply: we have just shown that the decision of this court in *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S., 1, rested the constitutionality of the act not only upon the power of Congress to regulate commerce, but also upon its power to establish post-offices and post-roads, and—

"18. To make all Laws which shall be necessary and pro-

per for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In that case the opinion of the court opens with the words:

"Congress has power 'To regulate Commerce with foreign Nations and among the several States.' (Const., Art. I, sec. 8, par. 3); and 'to establish post offices and post-roads,' (Const., Art. I, sec. 8, par. 7)."

And in the next two paragraphs, page 9, the court said:

"Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steam boat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the General Government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation."

And on p. 10: "It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate

legislation, to prevent the State from placing obstructions in the way of its usefulness."

The opinion refers to the power of Congress to regulate commerce; but, from the beginning to the end, it also discusses the power of Congress "to establish post-offices and post-roads," and the opinion largely rests the constitutionality of the statute upon the power of Congress "to establish post-offices and post-roads," and its duty to enact statutes carrying this power into execution. No subsequent decision of this court has weakened the force of that opinion, or the reasoning upon which the court based its conclusions. The opinion is always approved where subsequently cited.

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158 U. S., 1.

Subject. Power of Congress over Post-Roads.

In *Roberts* v. *Northern Pacific Railroad*, 158 U. S., p. 1, Mr. Justice Shiras in delivering the opinion of the court, pp. 21–22, said:

"Congress has 'power to regulate commerce with foreign nations and among the several States,' and to 'establish post-offices and post-roads.' Const., Art. I., sec. 8, par. 3 and 7. As was said in *Pensacola Tel. Co.* v. *West. Union Tel. Co.*, 96 U. S., 10: 'The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all;' and it was held, that a law of the State of Florida which attempted to confer, upon a single corporation of its own, the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory, was inoperative against a corporation of another State, where Congress had enacted 'that any telegraph organized under the laws of any State should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States,'

and where such other corporation had secured a right of way by private arrangements with the owners of the lands. This principle has been repeatedly recognized by this court in numerous decisions. *Telegraph Co.* v. *Texas*, 105 U. S., 460.

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158 U. S., 564.

Subject: Power of Congress and National Government over Post-Roads.

In re Debs, 158 U. S., 564, Mr Justice Brewer, in delivering the opinion of the court, at p. 599, said:

"We have given to this case the most careful and anxious attention, for we realize that it touches closely questions of supreme importance to the people of this country. Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; **that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail.** * *."

Reply to Appellant's Fourth Contention.

The 4th contention on the part of the city (see p. 49 of its note) seems to be that the company made a contract and agreement with the city in 1884 that it would cut down its poles and remove its wires and plant, and destroy its business, whenever the city called on it to do so, without regard to any rights it might thereafter acquire from any superior or paramount authority. We fail to find any such agreement, express or implied. The only two sections of the ordinance of 1884 bearing upon this question are the first and fifth, which are as follows:

"1. Permission is hereby granted the Southern Bell Telegraph and Telephone Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance.

"5. The ordinance may at any time be repealed by the Council of the City of Richmond; such repeal to take effect twelve months after the ordinance or resolution repealing it becomes a law."

If it be conceded here that a repeal of this ordinance carried with it a repeal of the right to occupy the streets on which the company had before then placed its poles (which is denied, and will be referred to hereafter), still the utmost that the ordinance could be construed to mean, would be that such rights as were given and claimed under this ordinance, were repealed. The ordinance doesn't say—cannot be construed to say—that anything is to be repealed except such right as was conferred under it. If, when the time for repeal comes, the company occupies the street under the rights conferred by the ordinance, and also under the rights acquired from some other source, all it would have to surrender would be the rights acquired under the ordinance. Suppose it had happened that a street was owned by a private person in fee, and that the company had under this ordinance occupied it, and after that had purchased the title from the owner; could it be held that the repeal of this ordinance would defeat the title of the company to this street? No. It could only take from it, at the most, the right given it by the ordinance. The city here (taking now the view that the city takes about the right of repeal), gives the company a right to occupy a street, with reservation of a right to repeal the ordinance. There is no agreement by the company that it will move out of the street, should this be done. There is no provision of this sort in the ordinance. But for the provision of the right to repeal, the company

could claim that the right of occupancy conferred on it by the ordinance, could not be taken away,—but the provision for repeal (interpreted as the city does it), means that the right of occupancy *granted by the city* may be taken back. That is all that it can by any possibility mean. To hold that the company agreed, or that the city intended by this that the company should agree, not to acquire other rights to occupy the streets, or that, if it did so acquire them, they should not avail it, is, we submit, going beyond all reason and authority. Under the principles contended for here by counsel for plaintiff—If A. has a house which is about to fall down for want of a prop, and were to bargain with B. to prop it up for a consideration, but with liberty to B. on 30 days notice to remove his prop—and were afterwards to bargain with C. also to put up a prop so as to be able to hold it up even if B. should withdraw his—B. would have a right upon withdrawing his prop, to compel A. to remove the prop of C., and so let his house fall. We insist that neither the right to remove the support of a prop to a house, nor the support of an ordinance to a title to occupancy, will destroy the house or title, except so far as the house or the title is dependent for its existence on the support of the prop, or the ordinance. Until the company accepted the act of Congress, if it held under the ordinance alone and that holding were destroyed, the right to hold would be gone; but, after it accepted the act of Congress, it would hold under that as well as the ordinance, and the destruction of all other rights and titles, could not deprive it of that support which is ample to sustain it, and is paramount to all other titles which it has, to occupy the streets, and "construct, maintain and operate," its lines, in the language of the Act of 1866.

Reply to Appellant's Fifth Contention.

The fifth contention by the appellant is, that the Council of the city had "the power to pass the repeal ordinance of December 14, 1894, and it is sufficiently broad to require the removal of the poles and wires already erected."

We insist, first. That the city had no authority to annex this condition of repeal to the ordinance of 1884.

The Legislature of Virginia, which is the source from which the city derives all its powers, has provided for the entry into and occupancy of the streets of the city by telegraph and telephone companies, and for the repeal, modification and alterations of the rights of such companies after they have taken possession of the streets, in Chap. 54, Secs. 1287, 1288, 1289, and 1290, of Code of Virginia of 1887. Section 1287 provides that such companies "may construct, operate and maintain its lines * * * along and over the streets of any city or town with the consent of the council thereof." The next two sections give such companies the right of eminent domain (to condemn lands, &c.), and prescribe how it is to be exercised, and the 1290th section provides that the General Assembly, at its pleasure, may revoke or modify the rights thus acquired.

There was thus no necessity for the repeal of such rights being given to the cities, the Legislature reserving this power to itself, and we submit there is no such power given by these sections to the city. All it had the power to do was to consent or refuse, and its consent once given was final, and no power to revoke it remained. Nor did it have a right to do indirectly, as by giving a conditional consent, what it could not do directly. The Legislature gave it no such power, and it has none unless it gets it from this source. See *Kirkham* v. *Russell*, 76 Va., page 956, which decides that municipal corporations can exercise "only such powers as by their charters are granted in terms expressed, or by necessary implication," and which says that any doubt arising about this matter must be resolved against the city.

In the case of *Hodges* v. *W. U. T. Co.*, 72 Miss., p. 910, it was held, "The power of a municipality over its streets under an ordinary charter, is subject to legislative control, and hence an ordinance exacting rent from a telegraph company for the use of streets for its poles is void, because in contravention of the act of 1886, which provides that any telegraph company shall "have the right to construct, operate and maintain telegraph lines on, or across or along all * * * streets," &c., making no provision for compensation to cities and towns.

The court says, pages 912 and 914, in distinguishing this case from the cases of *St. Louis* v. *W. U. Tel. Co*, 148 U. S., p. 92, and 149 U. S., p. 465, in which such a charge was maintained in favor of the City of St. Louis "the ground upon which the ordinance of St. Louis * * was placed * * is that the city of St. Louis is the absolute owner in fee of its streets and the charter powers of the city are *self appointed. It is expressly declared that St. Louis occupies a unique position. It does not like most cities derive its powers by grant from the legislature, &c,*" and then goes on to say that in the case before the court, as in the case here "all the power which the city has over its streets is derived from the legislature, whose power over them is supreme and transcendent." It is true, that in the Mississippi case, no right was given the city to consent to or refuse, the entry of the company upon its streets; but we insist that the power given the city of Richmond by the legislature of Virginia was simply a power to consent or refuse. It was never intended that the city should bargain and dicker with a company seeking to enter upon its streets and make conditions with it, not only not contemplated by the statute under which it was acting, but which were inconsistent with and opposed to its express provisions.

In the Mississippi case just cited, the ordinance was held void because the State statute gave the city no authority to annex any condition at all to the use of its streets. In the case at bar, the State law authorizes the city to consent or refuse that the wires of the company should be run "*over*" the streets, and the city claims the right, by refusing to give this consent, to compel the company to unite with it and change the law of the State so as to make its wires run "*under*" the streets. Surely the case at bar is stronger against the claim of the city here, than the case in Mississippi was against the claim of the city there, for in the Mississippi case the city merely undertook to annex a condition not authorized by the State, and about which the statute was silent, whilst here the city has not only annexed a condition not authorized by the State, but directly opposed to and subversive of the terms of the State

statute. In the first case it did what the statute was silent about. In the second case it nullifies the statutory provision, and then substitutes one of its own in conflict therewith. In the Mississippi case it built up what was unauthorized. In the case at bar it first pulls down what the State has built, and then builds what it has no authority to do on the wreck it has made of the State statute.

That the city cannot thus use its right to consent to or refuse the entry of a company into its streets, given by the statute to overturn and nullify the same and impose conditions directly in conflict with the conditions imposed by the statute, was decided.

In the case of the appeal of the city of Pittsburg, 115 Pa., p. 4, the court held that though a gas company—empowered by the Legislature to lay its pipes under the streets of the city and vested with the power of eminent domain (like the plaintiff here) which (see p. 21 of the report) could not enter upon or lay down its pipes or conduits on any street * * * of any city * * * without the assent of the Council—had accepted an ordinance of the city which undertook to provide conditions and restrictions under the ordinance by which the city gave its consent for the occupation of the streets, still the company was entitled to occupy the streets and disregard the conditions.

On page 21 the court says: "The Council are authorized to give or withhold their consent without more. They, the Council, have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agrees to accept the same and be bound thereby, and even then the condition of restriction so accepted by this company must harmonize and in no way conflict with the provisions of the act," and on page 24 "that the grant of assent was good and the conditions null and void."

The lower court, whose decision was affirmed in this case, had said, page 11, in speaking of the contest between the city and company over the validity of the ordinances that the city met the company's objections by replying "that it is immaterial; the act says you cannot enter without our assent: we as-

sent on these conditions; you must either accept them or stay out." It will be seen that the contention made in the Pennsylvania case was exactly the contention that the city of Richmond is making here. The Pennsylvania court said of this, however, on page 12, "if a city or borough does not want natural gas for consumption, it can refuse its assent to any companies entering for the purpose. But if it wants natural gas and gives its assent it must be on the terms and conditions of the statutes."

The city here, in the case at bar is insisting that it can, under a statute law which authorizes it to consent to the company's running its lines "along and over the streets," require the company to agree, *as a price for its consent* to a condition which would make it run its wires along and under the streets. So that the city is seeking to impose conditions not only not warranted by the legislative act under which it was acting, but which in fact are directly and point blank in conflict with its terms and provisions. The Legislature says the city may consent to the wires being run "over" its streets, and the city consents provided the company will agree that the wires shall be run *under* the streets.

Were the rights of the company resting alone under the State statute, the ordinance of the city requiring it to run under the streets would be, as was decided in Mississippi and Pennsylvania, null and void, because in conflict with the State law.

We do not see that the case of the *R. F. & P. R. R. Co.* v. *The City of Richmond*, 26 Gratt., 83, and in 96 U. S., page 521, cited by appellant's counsel, has any bearing on this point. In this case the railroad company claimed under an ordinance which (see 26 Gratt., pages 88–89) is as follows: "Whereas, by a resolution of the President and Directors of the Richmond, Fredericksburg and Potomac Railroad Company, submitted to the Common Council, it appears that it is deemed most expedient by the President and Directors to conduct the said railroad from the Richmond Turnpike, along H street, to a point at or near the intersection of said street and Eighth street, and for the present to terminate the same by suitable connections with the

contemplated warehouses and workshops of the company on lots Nos. 477, 478, purchased by them from John Heth:

"*Resolved*, That the Common Council do approve the proposed location of the said railroad and the present termination of the same, as described in the foregoing resolution, and authorize the prosecution of the said work within the limits of the city on the above locations: provided, that in locating the said railroad, no injury shall be done to the water pipes now laid in and along said street: provided further, that the corporation of Richmond *shall not be considered* as hereby parting with any power or chartered privilege not necessary to the said railroad company for constructing said railroad and connecting the same with the depot of the said company within the limits of the city."

The railroad company insisted that this gave them the right to use steam, and the city denied them the right to use steam. No attempt was made to deny the railroad company the right to run its trains and make its connections in the city, but the city claimed the right, in regulating the use of its streets, to prohibit the use of steam in the street used. The Court of Appeals of Virginia decided that the city had this right, saying on page 90 and 91:

"Not a syllable is recorded about the mode or manner of transportation, whether by horse-power or steam, the entire regulation of that subject being reserved to the corporation with the rest of its chartered powers."

And this court says in effect that its decision in this case would have been the same on this point if the assent of the city "had been absolute and unconditional." Showing that the decision was based, not on the effect of a condition attached to the ordinance, but on the power of the city to control railroads running through its streets, independent of any such supposed condition.

The Supreme Court of the United States affirmed this decision and merely held that "the power to approve implied a power to reject one location and accept another," and this necessarily

carries with it the further power to reserve such governmental control over the company in respect to the road when built within the city to the point approved, as may seem to be necessary. "*The absolute grant of the charter is satisfied if the road is built within the city for any distance, by any route, or to any point,*" 96 U. S., page 527 (italics ours). * * * And again: "By the condition imposed, these powers were all reserved, except to the extent of permitting the company to construct its road upon the route designated, and connect it with the depot. * * The company therefore occupied Broad street upon the same terms and conditions it would if the charter had located the route of the road within the city, but, in terms, subjected the company to the government of the city in respect to the use of the road when constructed."

True, the court held that the city had the right to prohibit the use of steam. But suppose the city had granted the railroad company the right to go to some point in the city, had approved of some point therein, and inserted a proviso in the ordinance, that they would repeal the ordinance making this grant and giving this approval, whenever they saw fit, and would revoke the right of the railroad to enter the city at all, and require it to remove its tracks from the street. That would have been a case more like the case at bar, and like the case in 115 Pa., and the court would, we imagine, have decided that the city had no power to insert such a proviso or condition in its assent to the selection of a terminal point for the railroad company, because it was not contemplated by the Legislature that it should do so.

We have said before that we cannot see how the plaintiff can be held to have agreed, by putting up its poles and wires under the ordinance of 1884, to take down these poles, and remove its wires from the streets in which they were put, on the repeal of said ordinance. The 5th section of that ordinance, which will be found on pp. 31–32 of the record, merely provides that this ordinance may be repealed at any time, &c. Surely, however broad a scope may be given to this section, it cannot be contended that a repeal of the ordinance, would repeal anything but the rights held under it, whilst the rights now claimed and

held by the plaintiff under the act of Congress of 1866, to "construct, maintain and operate," its lines could not be affected by such repeal; and no agreement that such rights were to be surrendered, can be inferred. Certainly no such agreement was made. In fact, it was not only not agreed that the rights of the plaintiff, acquired under this ordinance of 1884, in the streets and alleys where it had located its poles and wires under the first provision of the ordinance, should be repealed by the repeal ordinance, but such is not the meaning of the ordinance. We insist, secondly, that—

THE ORDINANCE NEVER INTENDED BY THE FIFTH SECTION TO PROVIDE FOR A REPEAL WHICH WOULD CAUSE THE REMOVAL OF POLES AND WIRES ON ROUTES AT THE TIME OCCUPIED BY THE COMPANY.

The first provision provides: "Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the condition and under the provisions of this ordinance."

The right here given to the plaintiff was to "erect poles and run suitable wires thereon * * on the public streets * * on such routes as may be specified and agreed on by a resolution or resolutions of the Committee on Streets, from time to time, and upon the conditions and under the provisions of this ordinance." The 5th section provides for a repeal of this ordinance; but we insist that the repeal of an ordinance allowing the erection of poles, &c., cannot and does not mean that poles already erected are to be cut down. No person would have imagined, on reading this ordinance, that its repeal, provided for in the 5th section, meant and carried with it the right to destroy valuable property and rights acquired under the ordinance whilst it was in force.

The court should not give it this destructive interpretation,

unless its language is so clear as to compel it to do so. The fair and natural meaning of this provision is that whilst the property and rights acquired under the ordinance while in force, are not to be disturbed, the further extension of the right to erect poles, &c., on streets to be agreed on by the Committee on Streets, is to cease.

The provision that the repeal ordinance was not to take effect till 12 months after its repeal, was simply meant to guard the plaintiff from the power the city otherwise would have had, to have repealed the ordinance within ten days after the work had begun—by which all the expense of the work such as the purchase of poles, wires and instruments, &c., might have been incurred and none of the benefits been secured,—whilst if it had the power to locate its poles and wires, as provided for in the first section of the ordinance, *for 12 months*, it would be able to secure a sufficient foothold for its work. Under such a condition of things, the Committee on Streets would have been morally and legally bound to have designated the streets in which the poles and wires were to be placed until the twelve months had passed. So we insist that not only was it not agreed by the company that it should remove its poles from the streets, no matter what its rights were to remain there under the acts of Congress, under which its rights subsequently were secured and protected, but that it was not agreed or even contemplated by the ordinance of the city itself, passed in 1884, that the company's poles and wires located, and rights acquired under the ordinance, were to be removed and destroyed by its repeal. The company's rights in this respect would be protected if they rested alone on the city ordinance of 1884.

The case of *Greenwood* v. *Freight Co.*, 105 U. S., 13, cited by counsel for defendant, has no application. That was a case where a State, by act of Legislature, chartered a company under a law which gave it the right to repeal the acts of incorporation, and all the court decided was, that a repeal of the act chartering the company, repealed the charter of the company, and in fact destroyed the company, and of course with it the right to use the streets of the city, and in fact to do any corporate act. Such a question might arise in this case, if the Legis-

lature of New York had the power to repeal the plaintiff's charter, and undertook to do so, but has, we submit, no bearing at present, on the controversy.

If a builder were to apply to the city of Richmond to put up a number of frame houses, and the Council were to pass an ordinance saying that he might put up as many as he wanted on such streets and in such places in the city "as may be specified and agreed on by a resolution or resolutions of the Committee on Streets from time to time, upon the conditions and under the provisions of this ordinance," and there was in the ordinance a provision for its repeal, on notice. It could hardly be contended we think, the frame houses which were put up while the ordinance was in force, would have to be pulled down after its repeal. The only effect of repeal would be to stop the building of more, just as we contend here, that the only effect of the repeal, even if the rights of the company stood alone on the city ordinance, and the city had the right to repeal it, and had done so, would be to stop the further erection of poles and running of wires thereon, on routes not before given to the company.

It would have been unreasonable in the extreme for the company to have consented in advance that its poles and wires which had been erected and strung at great expense, by the permission of the city, should be taken down and thus rendered useless whenever the city chose to so order it. And no agreement to that effect can be inferred from doubtful language, or effected by adopting the strained and unreasonable interpretation that a repeal of an ordinance allowing a company to erect poles and run wires, meant that the poles erected and wires run should be cut down.

Indeed, the ordinance which was passed under the power claimed by the city under the fifth clause of the ordinance allowing the company to erect poles, &c., does not, on its face, attempt to do more than forbid the erection of poles and running of wires in the future. The first ordinance provided that permission was granted to the company "to erect poles and run suitable wires thereon for the purpose of telephonic communication throughout the city of Richmond, on public streets thereof, on such routes as may be specified and agreed on by a

resolution or resolutions of the Committee on Streets from time to time." There is no other portion of this ordinance which grants "privileges and rights" to the company. The other sections prescribe limitations and restrictions as to the location of poles, cutting shade trees, &c. The ordinance approved 14th December, 1894, repeals the ordinance first mentioned, and then says, section 2: "All privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance." "All privileges and rights which were to cease and determine," means, by reference to the first ordinance, the right to erect poles and run wires on such routes as may be specified and agreed on by the Committee on Streets from time to time, and this language can give no authority for the removal of poles and wires already placed, or for refusal to allow the company to replace wires and poles on the streets already occupied by them, by and with the permission of the Committee on Streets. It only stops future location, under the direction of the Committee on Streets given from time to time, and if there is no ordinance requiring the company to remove poles and wires, approved twelve months before the period when it is to take effect (the proviso in the first ordinance requiring twelve months' notice), the city cannot require it of the company, even though the fifth section of the first ordinance were valid and clearly authorized the passage of an ordinance requiring the poles and wires to be removed.

Reply to Sixth Contention of Appellant.

The court has never decided, and we have never contended, that the appellee is free from reasonable and proper control of the city. This matter has been discussed fully by us in the former part of this note, and the record we submit shows that the struggle here, on the part of the company, has been, not for freedom from control on the part of the city, but for the right to exist, "to construct, maintain and operate its lines." The city is demanding sentence of death on us, and we are asking only for life. When this, our life, is assured to us, as we confidently think will be the case, we earnestly trust that there will be no

need for further appeal to the courts, as we are anxious to submit to all reasonable and proper control, and hope and trust that the city will not seek to impose more than this on us.

In this connection, however, though we do not think the question need now be considered—for the city denies that we have any rights at all in its streets—we beg leave to refer the court a little more in detail to what are called the Subway cases, decided in New York, by which the wires of telegraph and other companies were put underground, and which have gone farther than any we know of in this matter to give the city control over the wires of companies in its streets. They are the cases of *The Western Union Telegraph Company* v. *The Mayor of New York*, 38 Fed. Rep., and the *American Rapid Telegraph Company* v. *Jacob Hess*, 125 New York. We do not think that either of these decisions controvert the doctrine we have contended for. The court especially says in *The Western Union Telegraph Company* v. *The Mayor of New York*, 38 Fed. Rep., p. 555: "The State, when providing by legislation for the protection of the public health, public morals, or public safety, is subject to the paramount authority of the United States, and may not violate the rights secured or granted by that instrument, or affect the power confided to the general government," and quotes with approval the language of the Supreme Court, which says:

"For while it may be a police power, in the sense that all provisions for the health, comfort and security of the citizens, are police regulations, and an exercise of the police power, it has been said more than once in this court, that even where such powers are so exercised as to come in the domain of the Federal authority, as defined by the constitution, the latter must prevail."

This decision, evidently, like the case of the *American Rapid Telegraph Co.* v. *Jacob Hess*, 125 N Y., 552, was based upon the ground on which the New York court puts it on page 650, "that the laws of Congress were perfectly satisfied," and the rights granted under those laws, preserved and protected by what the New York Legislature had done. In these cases, there

was no attempt made to take from the companies their franchises, to drive them out of the streets of New York, as is the case here, but they were simply required to put the wires in underground passages *which had been already provided for them*, when notified so to do by the authorities. Both of these cases it seems to us, concede that the rights granted under the act of 1866, are superior to the powers of the States and cities under their police power. And especial emphasis is laid on the fact that the conduits had been built, and were ready for use, whilst in this case the company is required to build, not only for itself, but for its rivals and for the city, (the latter without compensation).

Again, the action which prevailed in New York was taken under a statute and not under a city ordinance, and applied only to cities having a population of half a million. It will also be noticed that the Court, in the case in 38 Fed. Rep., p. 560, decided clearly and distinctly that the telegraph company could not be compelled to remove its wires entirely from the streets or post roads, as it restrained and enjoined the removal of the wires from the elevated railways, which were the only post roads from which, under the claim of the city, they were compelled to be removed, as in the streets they could remain by being put in subways already provided for them. Whilst neither of these cases are opposed to our contention in the case at bar, and in fact we insist sustain our positions, we submit that, were it necessary to do so, we could appeal with some confidence to this court to refuse to concur, at least in so much of the opinion as construed the language of the act of Congress, which says, "along and over," to mean *along and under* the streets.

Ground for Equitable Jurisdiction

Ample ground for equitable relief and for injunction exists. The statements in the bill, on pages 11 and 12 of the record, (which, so far as uncontradicted or questioned, are admitted as true) show this. Not only were there grounds for fearing this action of the city, and threats against our rights calling for this protection, but our customers were being deterred from dealing

with us, and driven off to our rival, and our business ruined, by these ordinances, and by these threats based upon them; and unless the court had interfered we were absolutely without redress. The constant menace of the city, affected by merely holding over us the ordinances threatening the company with expulsion from its streets and destruction, naturally and necessarily would drive off its customers to its rival, and ruin its business, and was doing so, till the court granted its injunction, as was proved by the statement of Mr. Rood, p. 82 of record. This would alone be ground for equitable relief. Indeed, the company had no other remedy, and would have lost all its business and customers had it not appealed to the court. The contention, of counsel for defendant, on this point, is fully answered by the decision of the Supreme Court of Maryland in the case of *Riddick* v. *City of Baltimore*, 49 Md., p. 217, in which the court sustained an injunction to restrain the city from enforcing the collection of fines, imposed by ordinances, before its Mayor. The fines are, like the fines in this case, imposed to enforce obedience to an ordinance of the city, and the court enjoined not only the action which had been brought, but others which were threatened; and says that where a municipal corporation is seeking to enforce an ordinance which is void, a court of equity has jurisdiction at the suit of any person injuriously affected thereby, to stay its execution by injunction.

This case has been cited with approval by the Supreme Court of the United States in the case of *New Orleans Water Works Co.* v. *City of New Orleans*, on page 481 of 164 U. S.

Respectfully submitted,

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